Public Utilities

FORTNIGHTLY

May 11, 1939

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

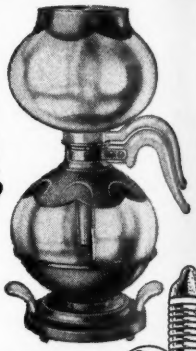
INCREASE YOUR LOAD WITH THESE

Genuine SILEX GLASS COFFEE MAKER

TRADE MARK REGISTERED U. S. PAT. OFF.

Brides' Specials

PLUS STRAINEX FOR MAKING TEA



ELECTRIC TABLE MODEL

Delray 8-cup model, black trim, regularly $4.95 complete with gleaming Moldex shell (35c) and Strainex (60c). Altogether a $5.90 value for only $4.95

10-cup size and red trim models slightly higher

DeLUXE BRIDES' SPECIAL!

The New Catalina Model — 8-cup size regularly $8.45 for only $7.45

Plus TAPPIT Catsup Dispenser FREE!

a $9.44 total value for only $7.45

(10-cup size $9.94 value for only $7.95)

Here's a promotion that will add load to your lines from Maine to California. The Silex Glass Coffee Maker, in these combination offers, is *the gift* for thousands of weddings and anniversaries. Every woman wants Silex, because it's smartest, makes the best coffee. New coffee makers plugged in on your line will add thousands of KWH to your domestic load. National advertising in The Saturday Evening Post plus hard-hitting campaigns in 86 leading newspapers will run during May and June. Thousands of Silex customers will be developed by this advertising. Tie up *for extra load profits* now!

The Catalina is the newest, most elegant Silex Glass Coffee Maker. It is at home with the finest table settings! In ivory Moldex, crystal clear Pyrex glass, and silvery-satin chrome it's a beauty. Available for the first time in a special price combination offer, *with* Tappit—the new, smart clean way to bring catsup to the table. Tappit is finished in matching ivory and silvery-satin chrome. The Catalina Model is equipped with *Anyheet Control*. Each model sold adds 97 KWH to your load. *Kitchen Range Model Brides' Specials with Strainex also available.*

Only Silex Has All These Famous Features

All Silex Glass Coffee Makers have upper bowl handles, Pyrex brand glass. Patented Silex drainer with cloth strainer held under spring tension, assures crystal clear coffee. Quick-cooling stove times infusion period. Brewing completed without removing glassware from stove.

These Promotional Helps Increase Sales

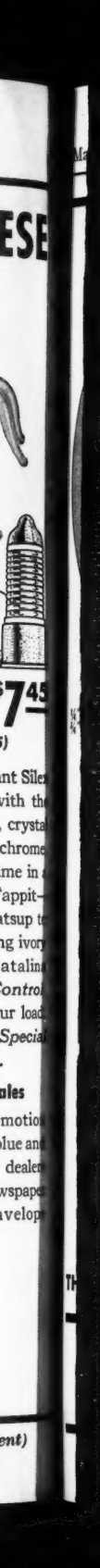
Each special in this promotion attractively packaged in blue and silver box. In addition, dealers will be furnished with newspaper mats, streamers and envelope stuffers.

Genuine SILEX GLASS COFFEE MAKER

TRADE MARK REGISTERED U. S. PAT. OFF.

THE SILEX COMPANY, Dept. P-5, HARTFORD, CONN.

Creators of the Glass Coffee Maker Industry



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Financial Editor—OWEN ELY

Public Utilities Fortnightly

VOLUME XXIII *May 11, 1939* NUMBER 10

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

Advertising Section

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

As this issue of PUBLIC UTILITIES FORTNIGHTLY goes to press, delegates and members of the United States Chamber of Commerce are assembling here in Washington for their annual meeting starting the first of May. Notwithstanding the critical state of international relations, the eyes of the well-informed American citizen are trained upon this particular conclave of business, big and little.

PERHAPS by very reason of the fact that threatened emergencies may, in the immediate future, exact from the business community supreme coöperation and drastic sacrifice in the national interest, the 1939 voice of business will have an attentive audience throughout the land. The people will want to know how American business feels about its present relationship with the American government. Have the Federal administration's recent steps in the direction of the so-called "business appeasement" produced any hopeful results, or has the movement been forgotten and overwhelmed in the stress of international politics?

THEN, too, there are the debatable questions which American business will want to have the government answer. Among other items in this category is a report of the Chamber's "Natural Resources Production Department Committee," which is of special interest to public utility industries. This report contained four recommendations which were scheduled to be placed before the annual meeting by the Chamber's board of directors. The recommendations were as follows:

1. Reiteration of the Chamber's fundamental objection to government competition, and government ownership.
2. Reiteration of the Chamber's policy calling for effective regulation by state commissions and, where it is necessary and within its proper jurisdiction, by the Federal Power Commission.
3. A declaration calling for equal regulation of public and private utilities. Such regulation should aim to prevent destructive competition. It should show the unbalance between the two because of sovereign powers inherent in government that inure to the benefit of its agencies.
4. A declaration calling for legally established rules of general application regarding the purchase of private utility properties by governmental agencies for use and operation as publicly owned utility systems, or parts

MILLARD MILBURN RICE

Is spending other people's money the true test of political liberalism?

(SEE PAGE 579)

OSWALD RYAN

He discusses the duties of the Civil Aeronautics Administrator.

(SEE PAGE 597)

thereof, the object of such purchase being the avoidance of destructive competition.

ANOTHER aspect of the relationship between the Federal government and business which will undoubtedly occupy the attention of the U. S. Chamber of Commerce is the matter of mounting congressional appropriations. This issue is so hackneyed that most of us are perhaps sick of hearing about it. But, like most controversial points, it is none the less important because it is unpleasant to think about. On the contrary, the need for economy in the operation of the Federal government grows more pressing with the addition of every dollar on the unbalanced side of an already skyscraping national debt.

ONE of the most effective barriers which the economy bloc has had to face in Congress is the challenging question, "Where would you cut?" This question, asked by President Roosevelt of his critics when his spending policies were first called into question, is the subject of a leading article in this issue. The author of this article, MILLARD MILBURN RICE, widely known business writer, analyzes what he believes to be a systematic technique which advocates of Federal spending have developed in order to justify before Congress their demands for additional appropriations. MR. RICE, a resident of Jefferson, Maryland, will be recalled by FORTNIGHTLY readers for his former contributions to this publication.

WE learn that the British Broadcasting Corporation will soon lose its autonomy to avowed domination by the British government "in the interest of the national defense." The British post office ministry says it will try to leave BBC directors a free hand as far as entertainment features of British radio broadcasting are concerned. But it is generally admitted and understood that British radio will henceforth function as a propaganda medium of His Majesty's government with respect to political, news commentary, and other programs in which the government feels there is a need for the "mobilization of public opinion."

THERE are, perhaps, good patriotic reasons for the British government to take this step. Under modern conditions it may well be that direct government censorship of radio broadcasting in time of war or near war is an unavoidable necessity. Nevertheless, this development points a finger at American radio.

UNLIKE Britain, Germany, Italy, or any other major country, American radio broadcasting is owned and operated under private management. For obvious technical reasons, however, it is subject to Federal regulation, which holds life-and-death power over the individual broadcasting stations through the issuance and periodical renewal of operating certificates. So far, there has been no serious contention that there is radio censorship in the United States under pressure of the Federal government which compares with the detailed official supervision of foreign broadcasting.

HERBERT COREY

Fear of the boss can be the most effective kind of censorship.

(SEE PAGE 588)

HOWEVER, there is a fair question as to whether there exists an indirect censorship operating in favor of Federal political policies because of the FCC's power over renewal of broadcasting licenses. Under color of voluntary submission by the industry, such a system of "regulation by suggestion" could be even more insidious than an avowed policy of government censorship. An invisible blue pencil held in the hand of the FCC and over the heads of the radio broadcasters might well result in the latter striking far more out of their programs through fear of regulatory reprisal than an open and aboveboard editing job for which the government would have to take editorial responsibility. HERBERT COREY, well-known Washington correspondent, discusses (starting page 588) this question of whether there is in effect a Federal censorship of radio broadcasting.

WE conclude the 2-part article on the Civil Aeronautics Authority by OSWALD RYAN, associate member of that Federal board.

THE next number of this magazine will be out May 25th.

The Editors

In This Issue

In Feature Articles

In Financial News

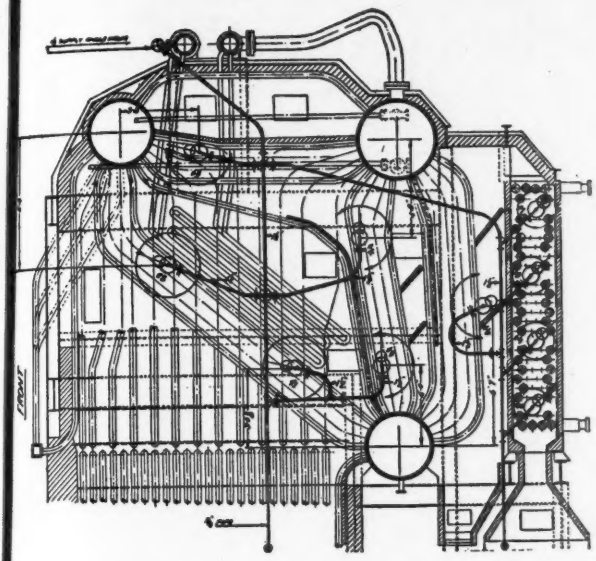
In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 257–320, from 27 P.U.R.(N.S.)



When Timken Roller Bearing Company engineers selected Soot Blower equipment for the new Foster-Wheeler boiler at Columbus, Vulcan was purchased because of the outstanding engineering features developed by Vulcan engineers. The new Foster-Wheeler boiler, 480 H.P., 420# pressure 630°T.T., is a unit of the model power plant being built at the famous Timken plant.

VULCAN SOOT BLOWERS FOR TIMKEN

Vulcan Soot Blowers have achieved an enviable reputation over the past 34 years in both stationary and marine steam plants. Honestly built, ruggedly built for long service, every Vulcan installation is a tailor-made job built to rigid high standards and exacting specification. It will pay every engineer and plant executive to examine the Vulcan equipment incorporating the new steam actuated Automatic Valve Head, the greatest improvement in Soot Blowers made in the last fifteen years. Time and service tested, no repairs have been necessary on thousands of units installed in the past four years.

VULCAN AUTOMATIC VALVE HEAD

Among thousands of plants, the following are typical of successful Vulcan installations: Swift & Co., Dupont Rayon, Celluloid Corporation, Atlantic Refining Co., Ford Motor Co., Armour & Co., B. & O. Railroad Co., Ralston-Purina Company, General Mills, Gulf Refining, Brooklyn Edison, Public Service of New Jersey, Kendall Refining, Jacob Dold, Firestone Tire, State Line, Carnegie Steel, United Refining, Texas Company, Studebaker, Burroughs, Pennsylvania Power and Light, Pennsylvania Electric, Jones & Laughlin, Nolde & Horst, Jas. E. Pepper, Solvay, Cincinnati General Hospital, Latonia Refining, Hudson, Dodge, Buffalo General Electric, Maytag, Clinton Co., Van Camp, Titanium, Skenandoa Rayon, Utah-Idaho Sugar Co., Tivoli Brewing Co., Castanea Paper Co., Republic Steel, Tennessee Coal and Iron, Youngstown Sheet & Tube Co.

Vulcan Soot Blower Corporation **Dubois, Pennsylvania**

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

KENNETH G. CRAWFORD
Writing in The Nation.

"American business is as unappeasable as Hitler."

HARRY S. TRUMAN
U. S. Senator from Missouri.

"The country never suffered from a lack of legislation."

DANIEL A. REED
U. S. Representative from New York.

". . . turkeys are now referred to as a $50,000,000 industry."

MERLE THORPE
Editor, Nation's Business.

". . . one man's liberalism is another man's authoritarianism."

EDITORIAL STATEMENT
Broadcasting.

"FCC's three R's—they might denote 'Regulation running riot.'"

ROBERT A. TAFT
U. S. Senator from Ohio.

"The SEC still takes the attitude that business men are presumptively crooks."

EVERETT M. DIRKSEN
U. S. Representative from Illinois.

"Give me control of the nation's air waves, and I care not who makes the laws."

GERALD W. LANDIS
U. S. Representative from Indiana.

"I love the old people, every last one of them, and I shall always stand for liberal old-age pensions."

ELLIOTT ROOSEVELT

"I am not a politician. I am not a New Dealer, anti-New Dealer, or any other type of supporter of 'isms'. . ."

CHARLES HAWKS, JR.
U. S. Representative from Wisconsin.

"The present administration has been more successful in making cheap farm prices than cheap electric prices."

WRIGHT PATMAN
U. S. Representative from Texas.

". . . 24 banks, 13 of them in one city, own more than 30 per cent, and approximately one-third of the banking resources of all the 15,000 or more banks in the entire United States."

EDITORIAL STATEMENT
Forbes Magazine.

"The New Deal was the greatest menace to American prosperity. The greatest menace today is excessive taxation."

FLOYD W. PARSONS
Editorial Director, Gas Age.

"Never have Americans been so fed up with impending crises, with endless warnings, and with tense emotional strain."

WILLIS J. BALLINGER
Economic Adviser, Federal Trade Commission.

". . . no program of recovery will restore healthy capitalism if it fails to include a restoration of healthy competition in industry."

MARTIN F. SMITH
U. S. Representative from Washington.

". . . the new frontiers provided by science and invention will furnish illimitable opportunities for the employment, prosperity, and happiness of our people."

ARTHUR W. PAGE
Vice President, American Telephone and Telegraph Company.

"The job of business is to guess what practices the public is really going to want to change and change them before the public gets around to trial for treason."

HARVEY C. COUCH
President, Arkansas Power & Light Company.

"I do not believe that rural electrification by the government was an effort to punish our industry but resulted from a sincere desire to make life more abundant."

HENRY C. DWORSHAK
U. S. Representative from Idaho.

". . . during the past few years huge sums have been appropriated by the Federal government for the development of water and power resources of the great West."

MARION L. CRIST
Engineer, Little Rock (Ark.) Municipal Waterworks.

"In most businesses the customer is at least open minded, but in the utility business he is quite likely to have either a definite or subconscious feeling of antagonism."

HARRY L. HOPKINS
Secretary of Commerce.

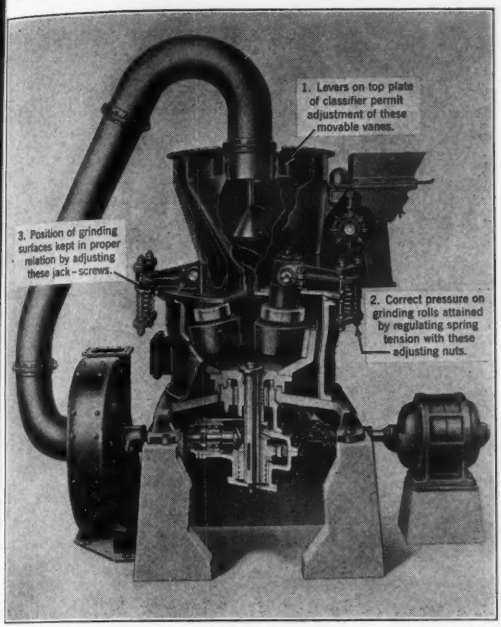
"I find some utility executives convinced that much of the past development within the industry was thoroughly bad—and they are anxious to see eye-to-eye with the government on a permanent policy."

LOUIS JOHNSON
Assistant Secretary of War.

"Time and again, especially in the last few months, we, in the War Department, have found it necessary to call upon industry for help and on no occasion, to my knowledge, has industry failed us."

EDITORIAL STATEMENT
Industrial News Review.

"Every tradition and institution in America is periodically under attack. . . . Socialism, Communism, Fascism, Nazism—all of these, judging by the critics of our social order, are better than democracy."



GET CORRECT FINENESS *EASILY...*

with this three point control of pulverization...

THE performance of a pulverized fuel fired unit depends in no small measure on the ability of the pulverizing equipment to maintain proper fineness of coal over the required range of mill output. Coal that is too coarse adversely affects combustion, promotes slag formation on boiler surfaces and increases combustible losses. Grinding finer than is necessary increases mill power consumption and reduces capacity, with no compensating gain. Therefore, it is highly important that a pulverizer be provided with a suitable means for fineness regulation.

The C-E Raymond Bowl Mill has three adjusting points which together permit complete regulation of fineness and adjustment for wear on the grinding surfaces. The location of these mechanisms, as well as their complete accessibility, is apparent from the illustration above. Their purpose and their effect on mill performance are summarized below.

1.—MOVABLE VANES in the upper part of the classifier, regulated by individual levers on the top plate, permit positive control of fineness over the entire range required by any practical operating conditions.

2.—CORRECT PRESSURE ON THE GRINDING ROLLS—which varies with the grindability of the coal—is regulated by adjusting nuts controlling spring tension on the roller journals. Thus power consumption and fineness of grinding are maintained in proper relationship.

3.—ADJUSTABLE JOURNAL SADDLES are fitted with jack-screws which permit adjustment of the relative positions of the grinding surfaces, occasionally desirable, to compensate for wear.

All these adjustments can be made quickly and easily *while the mill is running.* Regulation of capacity, air-coal ratio and air temperature is equally simple and positive.

When next you are in the market for pulverizing equipment, look for construction and operating advantages in addition to such commonly accepted measures of pulverizer performance as reliability, power consumption, maintenance, capacity and fineness. Look at the C-E Raymond Bowl Mill—a pulverizer which has proved in service not only that it assures exceptional results with respect to these usual measures of good pulverizer performance but also that it possesses other special advantages such as convenient adjustment and control. Quiet, vibrationless operation. Ability to handle high temperature air. Positive Lubrication.

New catalog is available. Write for your copy.
A-440

Combustion Engineering Company, Inc., 200 Madison Ave., New York • Canada: Combustion Engineering Corp. Ltd., Montreal

COMBUSTION ENGINEERING

Put CLEVELANDS on YOUR NEXT TRENCHING JOB and →

WATCH YOUR COSTS GO DOWN

Most "machine-ditch" at least cost. That's what you get with Clevelands.

This has been proven time and time again on thousands of miles of trench in all types of soil and under many various topographical conditions.

Whether the job's a long main line in the open country or short distribution lines in the confined areas of the cities and suburbs, you'll find as others have, that "Cleveland's" dependability, mobility and all 'round utility assure maximum footage and show definite worth-while savings in time and expense. "Clevelands" deliver this "bonus performance" because they are quality built from digging wheel to radiator cap. Nowhere is quality sacrificed to cost.

Compact, fast, flexible and mobile they are easy to operate and transport. Rugged and amply powered for the toughest task, they come through day after day delivering performance that shows savings that you never thought possible. Get the details today.

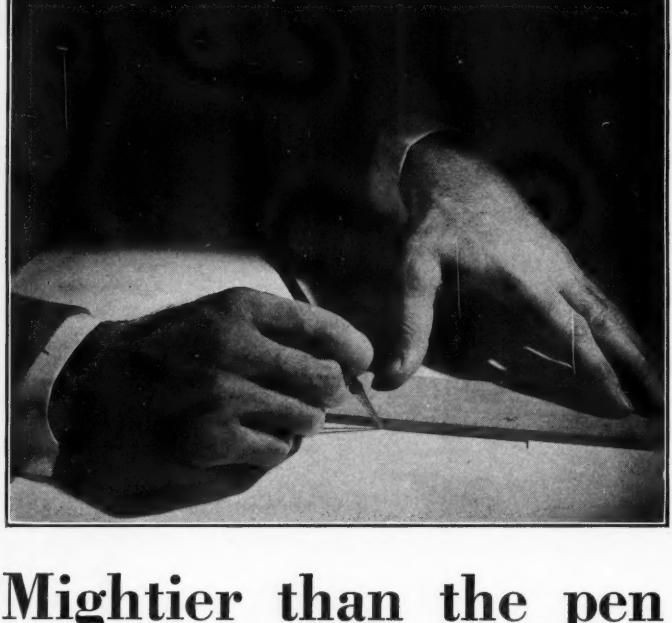
THE CLEVELAND TRENCHER COMPANY

"Pioneer of the Small Trencher"

20100 St. Clair Ave. Cleveland, Ohio

One important "Cleveland" idea that adds to the versatility of performance is illustrated at right—low cost transportation, at truck speed, via special trailer —"Clevelands" load or unload in 10 to 15 minutes.

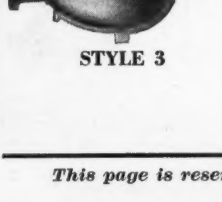
CLEVELANDS



Mightier than the pen . . .

Mightier than the pen are the brains and skill that conceive and plan, before the first thin line is drawn. Mightier than the ultra-modern, specially designed precision machine-tools that are putting greater accuracy, closer tolerances and finer finish into Trident Water Meters, is the experience of the Engineers who planned these modern Quality meters, plus the skill of the veteran artisans who produce them. A type for every service. Precision built . . . interchangeable parts. Today, as for years past, the predominating choice of the Water Works field.

The Symbol of Sustained Accuracy

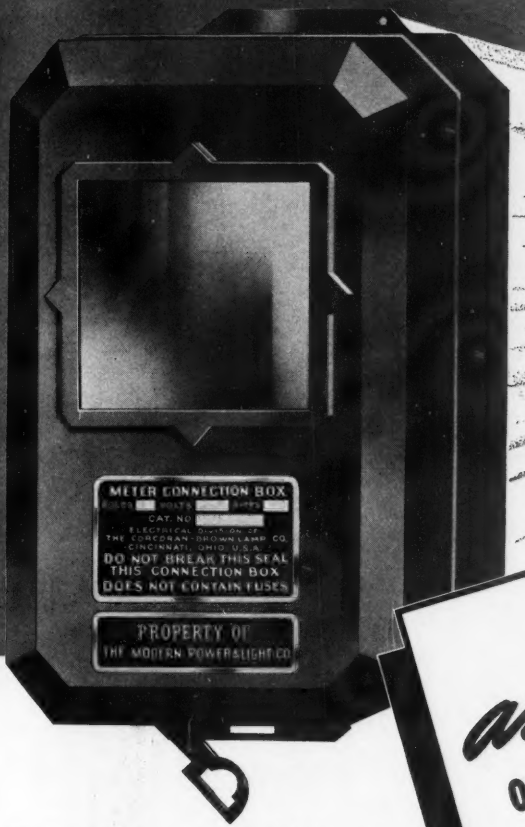


STYLE 3

1892—1939

Trident **WATER METERS**

● *Neptune Meter Company, 50 West 50th Street (Rockefeller Center), New York City. Branch Offices in Principal Cities. Neptune Meters, Ltd., 345 Sorauren Avenue, Toronto, Canada.*



YOUR *assurance* OF COMPLETE PROTECTION

When considering protection against current diversion losses, there are two vitally important questions you want answered. First, the performance of the equipment and second, the company who makes the equipment. Both questions are answered conclusively every day by scores of utilities and many thousands of installations throughout the nation. The story of performance is immediately available to all who are interested. Write for details.

Your file of Service Entrance Equipment data is incomplete without Corcoran-Brown catalogs. On request.

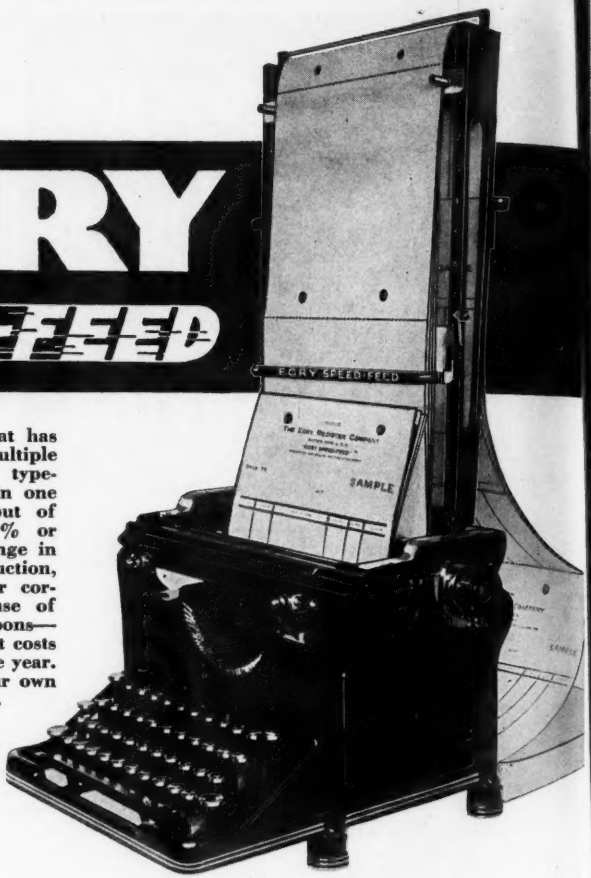
Electrical Department

CORCORAN-BROWN LAMP DIVISION

THE ELECTRIC AUTO-LITE COMPANY

4900 Spring Grove Avenue Cincinnati, Ohio

EGRY SPEED-FEED



The modern office machine that has revolutionized the writing of multiple copy forms by converting any typewriter into a billing machine in one minute, stepping up the output of typed forms per operator 50% or more, without making any change in typewriter operation or construction, or interfering with its use for correspondence. Eliminates the use of costly pre-inserted one-time carbons—saves time, labor and money, yet costs less than 2c per day for only one year. Demonstrations arranged in your own office without cost or obligation.

Address Department F511

Short Cuts to Sharp Savings

EGRY TRU-PAK REGISTER

The world's finest register. Gives complete control and protection over all initial transactions by means of private audit copies automatically filed under lock and key. Indispensable for cash, charge and C.O.D. sales and orders in appliance stores and scores of other uses.

EGRY HANDIPAK REGISTER

The ultimate portable register. Easy to carry as a sales book, handy as a pad of paper, the Handipak goes where business goes and makes records on the spot . . . out with delivery trucks, on the loading dock, in the warehouse, showroom. In seven convenient styles for all handwritten records.

The EGRY REGISTER Company

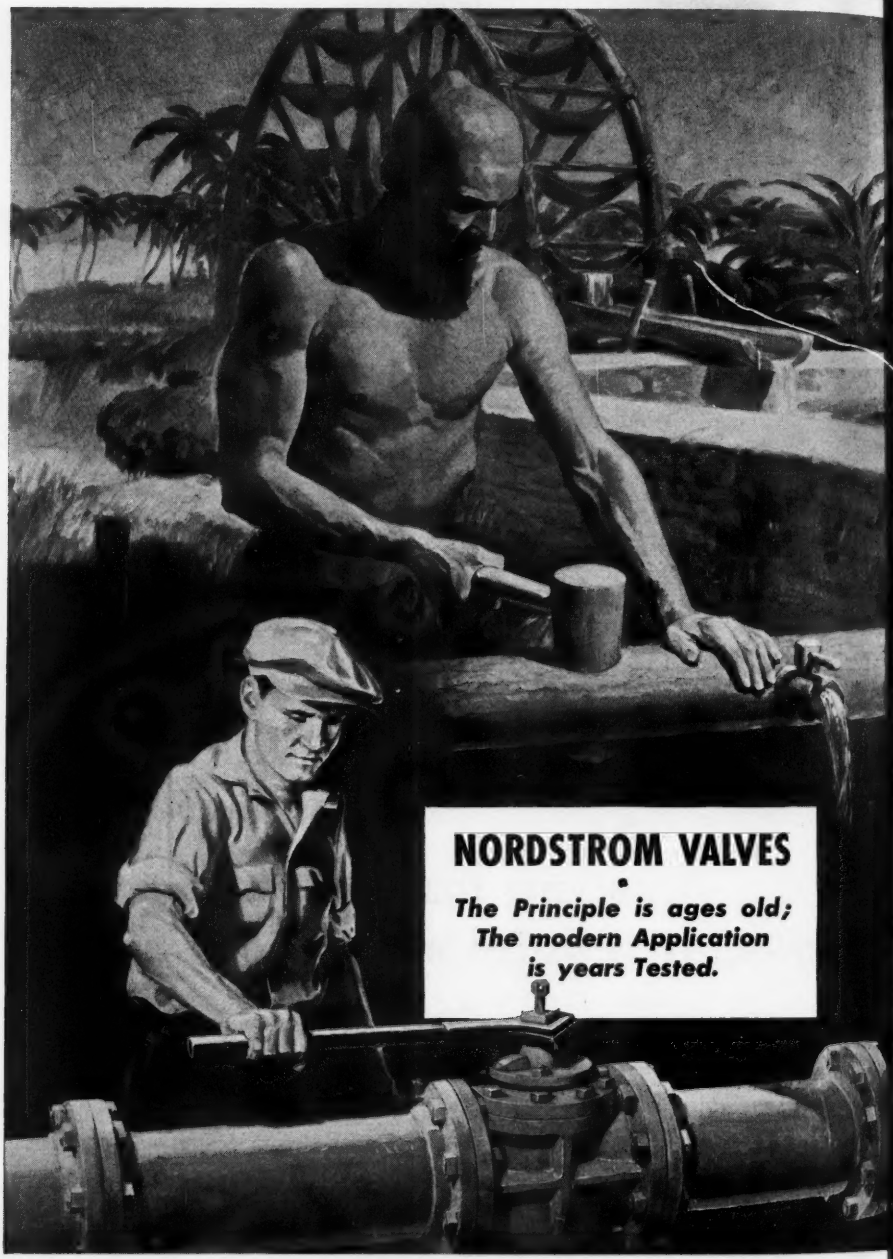
Dayton, Ohio

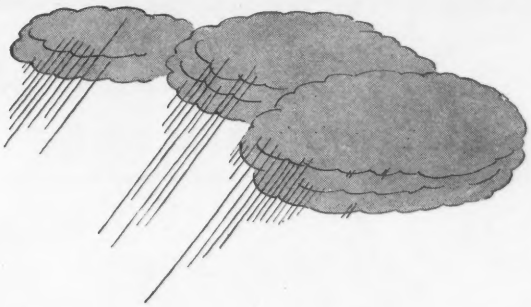
SALES AGENCIES IN ALL PRINCIPAL CITIES

A set-up for meeting special requirements in strand

WHEN special characteristics are required in strand, the place to begin is at the open-hearth furnace. The complete integration of all manufacturing operations under Bethlehem's system of control, beginning with steel making and following through all subsequent phases, is an important factor in making strand to meet special conditions.

BETHLEHEM STEEL COMPANY





Who Said:

"Nobody DOES Anything About the Weather"???

Contrary to popular belief, it was Charles Dudley Warner, **not** Mark Twain, who coined this naive bit of humor—"Everybody talks about the weather, but nobody does anything about it."

- - - - - - *but something has been done about it!*

Cat. No. W-95-DF

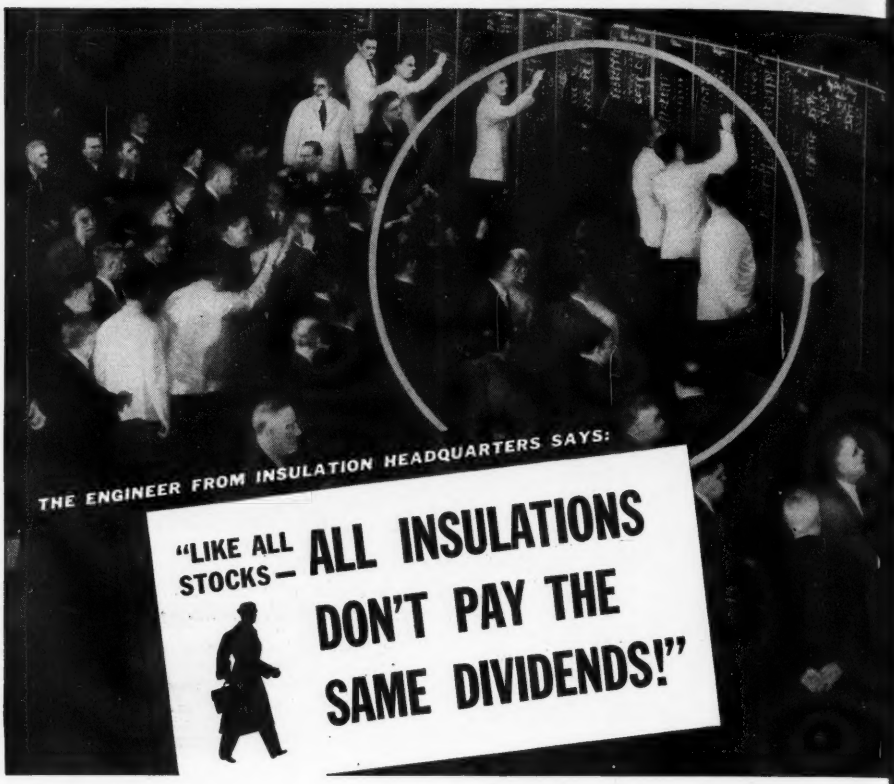
. . . . for Walker cheerfully disproved Mr. Warner's clever quip **years** ago—and through those years has so successfully thwarted old man Jupiter Pluvius and the rest of the bad-weather-mongers that the rust-proofed steel and aluminum of Walker outdoor electrical enclosures has become a well-established and effective means of "doing something about the weather" for hundreds of satisfied customers.

At the left: Weatherproof combination meter box and service switch (Cat. No. W-95-DF), one of Walker's numerous types of pressed steel or aluminum meter enclosures. Single cabinet can be furnished with drawn front; others in series available for standard types of meters in one, two, three and four gang, with or without space for test block. Ask for Walker Catalog No. 10.

WECO ATLANTA

WALKER ELECTRICAL COMPANY

ATLANTA GEORGIA



"SINCE insulations are purchased as an investment, the matter of dividends is of prime importance in their selection.

"As in the case of stocks, these insulation dividends are bound to vary. In fact, the cash returns in fuel savings promised by any given insulation are dependent upon three things . . . *kind, amount and application.*"

This statement made by the man from Insulation Headquarters deserves the careful attention of every insulation buyer.

It is based on experience gained by Johns-Manville through some 75 years of research and practical field service. Experience which has shown that one . . . five . . . or ten different kinds of insulations cannot possibly meet with maximum efficiency and economy the requirements of *all* heated or refrigerated equipment on the market today.

This is a truth long recognized at Johns-Manville. The present line of J-M Insulations totals some *forty* different types . . . each designed for a specific insulating service . . . And all sharing in common a time-established record for superior performance and durability.

• • •

Hence, having a line of insulations so unusually complete, Johns-Manville is in a position to help you choose the type and thickness of insulation that will assure maximum cash dividends, over the longest period of time, on each insulating job in your plant. For full details on all J-M Insulating Materials, ask for Catalog GI-6A. Johns-Manville, 22 East 40th Street, New York City.

Johns-Manville INDUSTRIAL INSULATIONS

An insulating material for every temperature . . . for every service condition

Utilities Almanack

MAY

11	T^{h}	¶ *Indiana Telephone Association concludes convention, Indianapolis, Ind., 1939.*
12	F	¶ *New England Gas Association, Operating Division, begins convention, Hartford, Conn., 1939.*
13	S^{a}	¶ *American Society of Civil Engineers, Arizona Section, starts meeting, Tucson, Ariz., 1939.*
14	S	¶ *National Electrical Manufacturers Association begins spring conference, Hot Springs, Va., 1939.*
15	M	¶ *Conference of Class A and B Member Companies, U. S. Independent Telephone Association, convenes, Chicago, Ill., 1939.*
16	T^{u}	¶ *Edison Electric Institute will hold convention, New York, N. Y., June 6–8, 1939.*
17	W	¶ *North Dakota Telephone Association opens meeting, Devils Lake, N. D., 1939.*
18	T^{h}	¶ *Pennsylvania Independent Telephone Association starts convention, York, Pa., 1939.*
19	F	¶ *Canadian Gas Association will hold convention, Hamilton, Ontario, June 6, 7, 1939.*
20	S^{a}	¶ *Association of Transit Equipment Men of the Middle Atlantic States will convene, Old Point Comfort, Va., June 8, 9, 1939.*
21	S	¶ *Empire State Gas & Electric Association will hold group meeting, New York, N. Y., June 9, 1939.*
22	M	¶ *American Gas Association, Industrial Gas Section, starts meeting, Brooklyn, N. Y., 1939.*
23	T^{u}	¶ *New York State Telephone Association opens session, Syracuse, N. Y., 1939.*
24	W	¶ *Association of Gas Appliance and Equipment Manufacturers opens convention, New York, N. Y., 1939.*

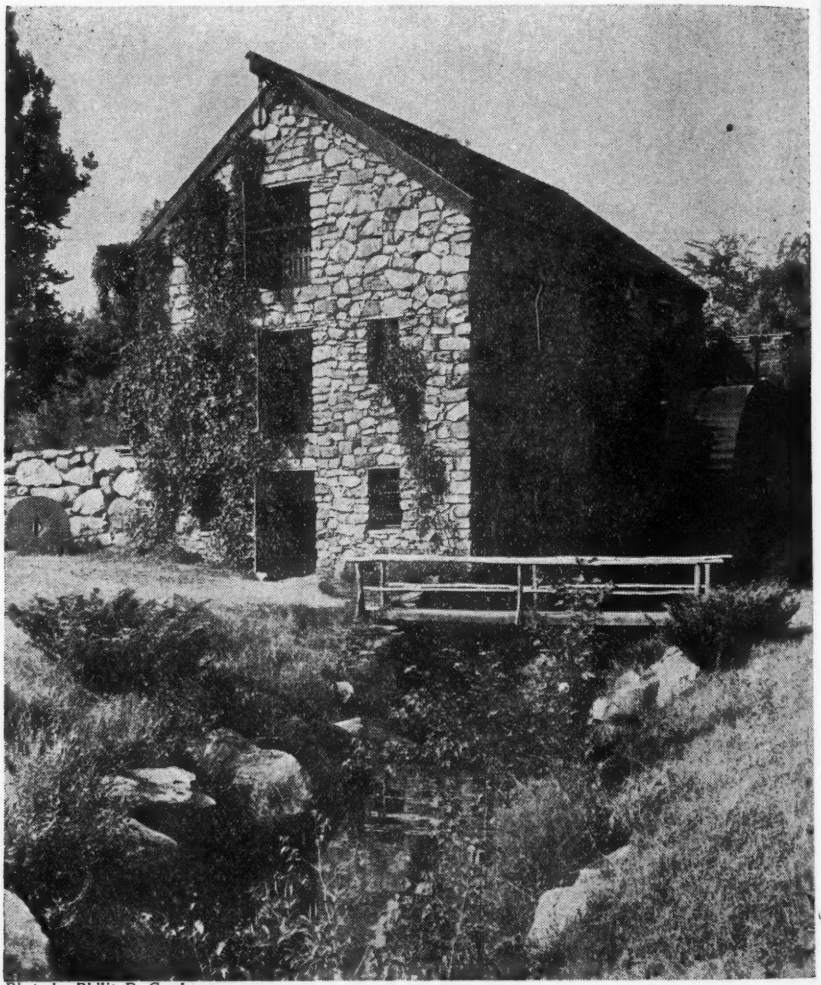


Photo by Philip D. Gendreau

Old Grist Mill

Near the famous Wayside Inn, Sudbury, Mass., recently restored by Henry Ford.

Public Utilities
FORTNIGHTLY

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Where Would You Cut?

That is the question, involving a consideration of fiscal liberalism, which President Roosevelt has often asked critics of his spending policies. This article indicates that the real reason why the economy bloc in Congress has difficulty in making an effective answer may be that it is unable to cope with the technique of Federal agencies in launching new projects or keeping afloat those already launched. The author concedes that he has here but scratched the surface of this technique because of the limitations of individual research. Even so, it is a viewpoint that warrants deliberation.

BY MILLARD MILBURN RICE

WITH the Left, the Right, and the Center all claiming to be Liberals with a corner on Liberalism, the term may be somewhat confusing. Perhaps this writer himself has been guilty of helping to becloud the meaning a little, for he once wrote a definition of a liberal, which was rather widely published, in which a liberal was described as one who spent a conservative's money liberally on experiments for which he would take credit if they succeeded, but for which he would blame the conservative if they failed. Obviously this was written tongue-in-cheek, and there is a slight possibility that it was also written thumb-to-nose. The circumstances of its publication indicated that it was scarcely to be taken too seriously, though a pretty good case might be made from recent history to show that liberalism and liberality have somehow become more than a little confused.

That earlier definition may lay a certain obligation now to write a more serious one. The dictionary will say in effect that a liberal is one not bound by established forms or philosophies. But it doesn't say what test he shall apply to his behavior after abandoning other

forms and philosophies. When all is said and done, it is the test he applies to his problems which determines his liberalism; and the test the true liberal must always apply is that every matter shall be considered strictly on its own merits. Only that is true liberalism.

For the purpose of this article, therefore, that is the meaning intended. We are about to examine certain fiscal acts and policies of the Federal government and apply to them this test of liberalism. Specifically we are about to ask whether, when appropriations are requested from Congress, the whole picture is impartially laid before Congress so that the requests may be decided entirely upon their merits. And we shall go further and raise the question as to what effect these policies may have upon the present state of mind in Congress in which the desire to economize seems to be present, but the place to begin economy doesn't seem to be capable of being located.

It is obvious that there are two principal ways in which fiscal liberalism can be defeated. The general attitude of Congress on appropriations for Federal projects such as public works and relief — which represent a large proportion of the budget—has been to appropriate as heavily as seemed feasible under existing conditions. If Congress can be made to feel that a need or demand for certain appropriations is very great, then the tendency is to meet as large a part of that need or demand as conditions permit. If the need or demand appears to be extremely large, a correspondingly heavy appropriation may be made. That is only human nature.

On the other hand, if a project can be shown to be of considerable importance, but capable of being undertaken with a comparatively moderate appropriation, the tendency of Congress is to make that moderate appropriation—and heave a sigh of relief. But once under way, if the demands of that project are continually broadened and expanded, frequently under the argument that to abandon the project is to lose everything thus far appropriated, then the tendency is to make additional appropriations with the hope of salvaging the earlier money. That, too, is behavior exactly in line with human nature.

It is a physical impossibility for any single Congressman or any group of Congressmen to go very far behind the figures brought before Congress by proponents of a measure or project. They must rely upon the impression created by the figures presented. Hence they must act upon the impression so created. It is just as truly a physical impossibility for an individual to comb the reports of every Federal agency and point out every case in which one or the other approach has defeated fiscal liberalism. That is not to suggest that there are so many such cases; no one knows how many there are. It is merely to say that there is so much fiscal material to be combed. We are obliged to confine illustrations here, therefore, to a few cases which come to light; or to discuss more or less general cases which illustrate the points involved.

Consider first a case in PWA. In response to Senate Resolution 61 (76th Congress) requesting the Federal Emergency Administrator of

Public Works to furnish "A list of non-Federal applications pending in the Federal Emergency Administration of Public Works," the administrator transmitted under date of January 18, 1939, a statement of such applications carried as pending. Included in this list were twenty projects calling for the construction of competitive municipal electric power systems set forth in tabular form below.

On the day following, January 19, 1939, the administrator appeared before the subcommittee of the Committee on Appropriations of the House of Representatives. At this hearing he introduced a list of PWA projects which indicated that the foregoing twenty projects were actually not pending, but had been rescinded. With a longer interval between, this situation might be considered nothing more than an error, but occurring on subsequent days it can scarcely be considered that. It is quite possibly an indication of reluctance to show reduced demands until the latest possible moment. The greater demand which can be shown for projects, the larger appropriations can be expected from Congress.

AN interesting case in point of the continued keeping alive of a project twice defeated by local referendum is that of Wichita Falls, Texas. In December, 1935, the voters of Wichita Falls rejected a proposed bond issue for a municipally owned electric plant to be constructed with PWA funds. In February, 1936, the same general issue, in modified form, was presented to the voters, and again defeated. In spite of these two rejections, however, an allotment of $1,750,000 was reported approved by PWA as of March 12, 1936. This allotment was for $963,000 as a loan; and $787,000 as a grant. Again, when 1938 appropriations became available, the same allotment of $1,750,000 to Wichita Falls was reported by PWA as of July 13, 1938. This project was not reported as rescinded until January 19, 1939, in spite of the fact that it had

MUNICIPAL ELECTRIC PROJECTS

State	*City*	*Grant*	*Loan*
Iowa	Rolfe	$ 44,550	.....
Kansas	Florence	51,300	.....
Kansas	Paola	113,312	.....
Michigan	Mt. Pleasant	218,000	.....
Minnesota	Le Center	57,150	.....
Minnesota	Northfield	160,200	.....
Mississippi	Meridian	638,182	$780,000
Missouri	Brayner	38,452	.....
Missouri	Liberty	148,509	.....
Missouri	Parkville	32,400	.....
New York	Saranac Lake	225,000	.....
Ohio	Fairport Harbor	66,000	.....
Oklahoma	Fairfax	77,310	.....
Oklahoma	Guthrie	304,852	.....
Oklahoma	Okmulgee	406,800	.....
S. Dakota	Freeman	49,700	.....
Tennessee	Alamo	19,000	24,000
Tennessee	Maury City	9,000	12,000
Utah	Garland City	36,000	.....
Virginia	Covington	181,636	.....

been rejected in principle more than three years previously.

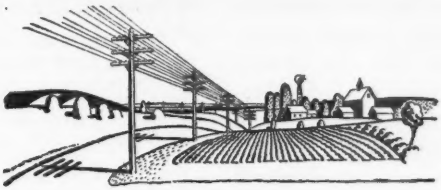
San Francisco furnishes a somewhat similar illustration. Seven times during the past decade the city of San Francisco has voted against various proposals to put the city into the power business. Yet at various times the city of San Francisco has been carried by PWA as a "pending project" applying for PWA funds. There has been some indication of reluctance to allow the San Francisco situation to be decided entirely upon its merits by the voters of the city. The Federal Emergency Administrator of Public Works, in his capacity as Secretary of the Interior, is charged with interpretation and administration of the Raker Act governing the operation of Hetch Hetchy dam. He has interpreted the act in a way which places the city of San Francisco in a position whereby it may yet be forced into the power business unless the act is amended. The Secretary has thus far been upheld in his interpretation by the United States District Court.

THE Rural Electrification Administration presents a somewhat similar situation with a different background. REA was originally established on May 11, 1935, by Executive Order No. 7037, under the Emergency Relief Appropriation Act of 1935. Relief funds were made available to it for rural line construction, and allotments for rural electrification made by REA during 1935 amounted to $6,977,012. On May 20, 1936, the REA became, by act of Congress, a permanent agency, with a 10-year lease on life, and $410,000,000 at its disposal during the 10-year period. It was to have $50,000,000 for the fiscal year of 1937, and $40,000,000 yearly for nine succeeding fiscal years. REA, therefore, was to be geared to spending approximately $40,000,000 yearly. But REA, like many of its alphabetical companions, became pretty strongly evangelical in its program. It most effectively pictured the virtues of electricity to the entire rural population of the United States. The result was that it created an active desire amounting almost to a demand for immediate construction of power lines to practically all accessible—and many inaccessible—farms in the country.

Allotments made by REA up to December 31, 1936, for rural electrification projects totaled $43,737,779. (Page 115, REA Report, 1938.) Total allotments made by REA up to December 31, 1937, were $81,573,843. These figures indicate that the REA was successfully expending its $40,000,000 yearly appropriation, and its administrative machinery was being geared to that figure.

WHEN, therefore, an additional $100,000,000 was about to be made available from RFC funds during the fiscal year of 1939, it might seem that the REA would have been confronted with some difficulty of spending $140,000,000 in a single year when its organization was geared to a figure only approximately one-fourth that large. But not so. The administrator, appearing before the appropriations committees, had this to say on that point:

> Although an extraordinary appropriation was made for fiscal year 1939 amounting, with the inclusion of a carry-over from fiscal year 1938, to $143,295,000, the fiscal year 1939 was entered with a backlog of



REA Allotments

"ALLOTMENTS made by REA up to December 31, 1936, for rural electrification projects totaled $43,737,779. . . . Total allotments made by REA up to December 31, 1937, were $81,573,843. These figures indicate that the REA was successfully expending its $40,000,000 yearly appropriation, and its administrative machinery was being geared to that figure."

unsatisfied applications of approximately $91,000,000. New applications are at present being received at an average rate of over $4,000,000 per week. We have already begun to discourage the development of new projects and extensions in those states and areas where they are reaching their statutory limits. We are suggesting they postpone their development until next fiscal year.

Already since the beginning of fiscal year 1939 requests have been received amounting to approximately $62,000,000. Added to the backlog of over $91,000,000 existing at the beginning of fiscal year 1939, there is at present an aggregate of over $153,000,000 to be taken care of by the total of $143,000,000 available for the fiscal year of 1939. This means that already requests are in excess of the loan funds available in fiscal year 1939, and there remain twenty-eight weeks of the present fiscal year for accumulation of additional applications now being received, as stated above, at the rate of $4,000,000 per week.

It is obvious, therefore, that an orderly and efficient completion of the program established by the act, and an adequate satisfaction of widespread farmer demand, call for the full statutory appropriation of $40,000,000 for fiscal 1940.

Whatever else the foregoing three paragraphs quoted from the testimony of the REA director may indicate (they are not consecutive in testimony, but their rearrangement here does not alter their meaning and effect), they show rather conclusively that when money is available a way will be found to spend it. Obviously, there are many demands for rural electrification, for rural electrification is a very desirable thing. But so long as such a program is designed to be self-liquidating and not purely paternalistic, there are going to be thousands, and probably hundreds of thousands, of farms which will be denied electrification for the very simple reason that for one cause or another a project supplying them cannot be made self-liquidating.

THERE is nothing at hand now to show what portion of applications for electrification are ineligible, but it is perfectly obvious that if REA is to escape the fate of our first great venture in planned economy—reclamation — it must select its projects with extreme care. Reclamation projects were originally planned to be self-

liquidating in ten years. Today a great many projects have had their liquidating term extended to as much as seventy years. At that rate, the 25-year limit set for REA loans will be in danger of extension to 175 years. There is some evidence to show that perhaps already the cream has been skimmed from the applications for rural electrification. This is indicated by the fact that whereas allocation lists used to be issued weekly, for some months past they have been issued only monthly. Hence, to show a need on the basis of the applications received is rather obviously not to approach the fiscal problem involved in a spirit of true liberalism.

The reverse side of this general subject finds illustration in TVA. The original heritage of TVA was Wilson dam at Muscle Shoals, built during the World War at a cost for the whole project of about $163,000,000. When debate was in progress concerning the formation of a Tennessee Valley Authority, it centered chiefly about the construction of the Cove Creek (Norris) dam and a power line from Wilson dam to the Cove Creek site to supply power for construction purposes. Little, if anything, appears in the debates which indicates the intention to expand TVA into the gigantic undertaking it has become. The general impression given the country at the outset was that TVA was to be principally a project for salvaging, by putting into operation the Muscle Shoals project, the original wartime expenditure of $163,000,000.

CONSIDER, for example, the following passage from President Hoover's veto message of March 3, 1931, of a former edition of a "Muscle Shoals bill":

> The total valuation of the owned properties to be taken over for the power portion of the project is therefore $42,000,000 after the above deductions from original cost. The new expenditures from the Treasury applicable to the power business are estimated at $90,000,000, less $5,000,000 which might be attributable to flood control, or a total of $127,000,000 of capital in the electric project. This sum would be further increased by accumulated interest charged during construction. As shown later on, several millions further would be required for modernizing the nitrate plants. The total requirement of new money from the Federal Treasury for the project is probably $100,000,000, even if no further extensions were undertaken.

In spite of this, demands for appropriations have been made and met until today, with the recent Gilbertsville dam appropriation, the total approaches $300,000,000; and it is now estimated by TVA officials that approximately half a billion dollars will be spent on the program before TVA is completed. There is little doubt that if such a figure had been brought forward at first—in spite of the huge figures bandied about at that time—the whole project would have been subject to much closer scrutiny than it was.

Having begun more or less moderately, argument for later appropriations could always be based upon the necessity of enlarging the program in order to make effective what had already been done.

Passamaquoddy and the Florida Ship Canal projects both had money allocated to them in order to get them started quickly, and when that was expended and work stopped for lack of further funds, the plea was made that these projects should be carried on by further appropriations in order not to lose the money already spent.

WHERE WOULD YOU CUT?

In spite of the painful and costly experience of the old Farm Board—in face of it, in fact—crop loans have been made under agricultural legislation. The impression created at the time such loans were being advocated was that they would be largely self-liquidating; that they were merely to insure orderly marketing of the crops affected; that expenses incident to the crop loans themselves would be relatively small. Consider, however, the case of cotton. On March 11, 1939, Edward A. O'Neal, president of the American Farm Bureau Federation, speaking over the radio program of the National Farm and Home Hour, had the following to say, among other things. He was, incidentally, advocating still another program affecting cotton to be called "The Ever Normal Warehouse Export Plan." Said Mr. O'Neal:

> We (the board of directors of the American Farm Bureau Federation) took the position that the immediate problem is to sell cotton. If we have to sell it at a loss in order to get rid of it, then let's sell it at a loss, but sell it. It's costing the government almost $50,000,000 just to carry the surplus now, and it seems just plain common sense to spend some money now to get rid of this drain on public funds.

That argument has a familiar ring to it. Spend some more money to save some already lost!

Further on in his address Mr. O'Neal continued:

> I want to repeat, and I can't say it too emphatically, that this surplus cotton must be sold. It won't rot; you can hardly burn it; and it is utter folly to keep on paying nearly $50,000,000 a year to carry it. We can't get rid of all of it in one year, or even in two, but for the sake of the cotton industry and everybody connected with it, let's make a start.

When this program was first proposed, allusions to the costly experience of the old Farm Board, under strikingly similar circumstances, were conspicuous by their absence. No one came forward with a warning — or even a suggestion — that the carrying charges on the cotton loan alone might some day reach $50,000,000 a year. The test of pure liberalism was not applied.

An example of what might be termed the strong-arm, or shot-gun, method of meeting fiscal matters is that of the FBI. On March 22, 1939, the House of Representatives, considering deficiency appropriations, took up an amendment presented by Representative Randolph (W. Va.) designed to restore the FBI deficiency appropriation to $600,000. During the discussion, testimony taken earlier in the month from Edward A. Tamm, assistant to the FBI director, was re-

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ferred to. This is so much to the point that part of it is reproduced here. Representative Woodrum (Va.), chairman of the subcommittee of the House Committee on Appropriations, was the questioner:

> MR. WOODRUM. Do you not think that Mr. Hoover (FBI director) is under some obligation to cut his pattern according to the cloth, and live within his income, or the amount that Congress has allowed?
>
> MR. TAMM. If that is the will of Congress—
>
> MR. WOODRUM. It it not only the will of Congress but it is the law. No one has the right to deliberately create a deficiency. I am speaking frankly about it, and I know that is the way the committee feels.

Here Representative Taber (N. Y.) intervened to voice the suspicion that certain agencies deliberately created deficiencies and then left it to Congress to act as an emergency measure rather than on the merits of the cases.

ALL of this lack of fiscal liberalism we have been discussing bears directly upon the behavior of Congress at the present session. As this is written, there is a faint stirring of economy in Congress, but this bids fair to die aborning largely because congressional leaders cannot agree where reductions in expenditures shall be made. This inability so to agree is itself largely due to the fact that there has been absolutely no help offered in this direction by any of the agencies of the government. Not a single instance comes to mind in which any agency has offered any avenues of retrenchment, and this in spite of six years of continuous "reform and recovery" efforts. The requests for WPA funds illustrate this admirably. No one knows what the actual need is. The mayors of cities have been asked to present estimates of their needs, and unless all of them have gone completely off the deep end politically, they have put their estimates up above what they hope to get in order to be sure of getting enough. Obviously, under such a system, a huge and pressing need can be shown, and there is no way for Congress to assess the urgency of the need as shown.

Previously we mentioned reclamation. That furnishes a most interesting illustration of the confusion of aims and hence of fiscal policies which confronts Congress. Through soil conservation and other farm programs, so-called marginal lands are being withdrawn through government efforts and with government funds. Through reclamation, on the other hand, below-marginal lands are being put into cultivation—for certainly any land can truly be called below-marginal which requires an expenditure of from two or three hundred dollars up to more than five hundred dollars per acre to bring it under cultivation. The very inconsistency of these programs is bewildering, and hence is not a meeting of the problems on their merits. It is political and fiscal expediency rather than political and fiscal liberalism. It is small wonder Congress can't decide where to cut appropriations.

THIS whole attitude of nonrealistic fiscal policies came to a direct focus on March 23, 1939, through testimony of Marriner S. Eccles, chairman of the Federal Reserve Board, before a special silver committee of the Senate. Mr. Eccles has been one of the chief champions of heavy government spending and lending. He still adheres to that policy. Yet before this special Senate committee he said that he now believes a majority of people desire re-

trenchment, and in effect, if not in so many words, he invited the Congress to find some way of making reductions. He proceeded then to point out the difficulties in such a course, and offered no constructive suggestions. The whole effort of Mr. Eccles and many of his associates in the administration has been directed during the past half-dozen years to spending and lending. Suddenly he suggests that, because a majority of the people now appear to want retrenchment, retrenchment should be made. Yet neither he nor anyone else in the administrative agencies offers any help in the matter. The burden of that is shifted suddenly to the shoulders of Congress. Having created a situation which he says the majority now desire changed, no effort is made to help change it.

Of this attitude of mind *The* (Baltimore) *Sun* expressed itself editorially on March 24, 1939, in what perhaps sums up the entire subject of fiscal illiberalism. Said *The Sun*:

> Perhaps this performance of Mr. Eccles throws as much light on the present situation as we could hope to have in any single day. For it makes more clear than ever before the fact that we have been governed during the last few years not by men with that elasticity of mind which comes from understanding and experience, but by men with minds often thrown into confusion by the inflexibility of their own doctrines.

True liberalism implies not only elasticity of mind but also, as we said at the outset, a willingness to meet a situation on its merits.

British Utility Air Raid Precautions

FOLLOWING *is an excerpt from the annual report of the chairman of the general stockholders' meeting of the City of London Electric Lighting Company, Ltd., on March 15, 1939:*

"For many months past your directors have given constant attention to the problem of Air Raid Precautions. It is obvious that the City of London will be a vulnerable spot in the event of aerial warfare, and the responsibility for safeguarding the supply of electricity is a serious one. This is not the time or place to go into much detail, but I can assure you that every reasonable precaution is being taken.

"The scheme which the company has put into operation has been discussed with the Home Office experts and approved by the Electricity Commissioners. Briefly, it consists of three parts—the provision of shelters for employees; the protection by various methods of generating and transforming plant; and the accumulation of spare plant and cable for use in emergency. The cost of this has been heavy, and whilst some of it can be placed to capital account, my colleagues and I feel that, having regard to further expenditure which must be incurred, a substantial portion should be borne by the general revenue of the company. We have therefore allocated £11,975 for this purpose."

Radio Is Censored

Editorial judgment of broadcasting station owners not so free as that of newspaper publishers—the license club

By HERBERT COREY

LET us begin with the indictment: Radio in the United States has been subjected to censorship. Congress enacted a law which left the way open to censorship, the Federal Communications Commission took that way, and the courts have specifically upheld the commission. The First Amendment to the Constitution provides that Congress shall not make any laws which shall abridge the liberty of speech or of the press.

Free talk and free press are coupled in that amendment. The protection for the one is the protection for the other.

But radio has been censored. The press has not been. More than once efforts have been made to censor it. In one of the cases that comes to mind a man up in Minnesota published a "scandalous, malicious, and defamatory" newspaper. No attempt was ever made to ascertain the truth of the statements made. The publisher appealed to a loose-lipped public, hungry for scandal and excitement and lies. Under a Minnesota statute the publication of the newspaper was enjoined by a Minnesota court. No real effort was ever made to prove that the publisher came into court with clean hands. His newspaper was all the prosecuting attorney charged it with being. But the Supreme Court said that its publication could not be forbidden. Such action by the state, the court said: "Is of the essence of censorship."

If that had been a radio broadcaster he would have been gagged and muffled until not so much as a querulous peep could have been heard.

A newspaper that publishes lies and scandal and malice is held responsible under the various laws. Damages may be assessed against the publication. If its editors are guilty of carelessness or libel they expose their employers to all sorts of penalties. This makes them careful, for an editor who reads copy too carelessly loses his job and a job lost for carelessness that costs the boss money is no recommendation to another prospective boss. The publication of the paper cannot be prevented, no

matter how scurrilous it may be. But scurrility can be punished.

Underscore that line. That is the reason why we have a free press.

No one can handcuff our editors. No government censor sits at an editor's elbow to tell him what he must and must not print. It is true that during the World War a Milwaukee paper was refused the second-class mail privilege because it had taken position in criticism of some of the things that were being said and done at the time. Seven Supreme Court justices supported this action and Justices Holmes and Brandeis dissented. The ground for the action had been that the publication had become nonmailable under the Espionage Act. Justice Brandeis, in his dissent, said: "If such power were possessed by the Postmaster General he would become the universal censor of publications. Denial of the use of the mails would be for most of them tantamount to a denial of the right of circulation."

Justice Holmes said: "The use of the mails is almost as much a part of free speech as the right to use our tongues."

That decision was rendered by the Supreme Court at a time when even the courts were a bit hysterical under the pressure of war. If the court were called on today to decide the same case, there is little probability that the same judgment would be handed down. But if a war were going on and a similar case were offered to the court, it is at least possible that the court would be of the same opinion. Things happen during a "national emergency" that would never be tolerated at any other time. Unfortunately "national emergencies" have a way of establishing themselves as permanencies. Presently a law which was recognized as dangerous when it was enacted has been granted a tolerance. Let us get back to our text.

Radio is being censored by the FCC. But the censorship is a post censorship. It is imposed after the fact. There are no rules to govern broadcasters except the knowledge that if the FCC does not like what they have been saying, the license of the station over which it has been said may be taken away. The censorship most of us have in mind when we use the word is the kind of censorship now existing in Germany, Italy, and, lately, England. An editor is told what he may print and what he may not print. He is told the attitude he must adopt toward certain matters. If he tries to get away with anything, not only does he not succeed but the publication may be suspended and he may be lodged in a damp cell for a long time. No government official would try any censorship of that sort in the United States.

The FCC has never tried it. It does not pass on the scripts which are to be broadcast. But under the law it has the right to refuse to renew the license of a station which has not been conducted, in the opinion of the FCC, "in the public interest, convenience, and necessity." That phrase covers everything. The owner of a station, or the prospective owner, may be called on to prove that his moral character is good and that he will unflinchingly give away time to charitable movements in his town and that he will furnish an acceptable quality of chamber music. There is not, so far as one can see, any chance for a station owner to get a license the FCC does

not want to grant. Or to hold a license against the FCC's will.

THEREFORE the station owners see to it, broadly speaking, that nothing is said over the air from their stations that might offend the FCC. They do not know just what might offend but they take as few chances as possible. Not only are they the possible sufferers if the FCC is annoyed, but any other stations on the same network may also suffer. Unless a script is submitted it is obviously impossible for the management of a station to know what will be said by the man at the mike. By the time it is said it is too late. In the eyes of the FCC one station on the net is just as guilty as the originating station. Evidently all stations are equally guilty if one of the number is found guilty. But it is simply not possible, for reasons of time and engineering, for all stations to be informed of all scripts that are to be used on the net. All stations must be governed by one station's fears. Keep in mind the fact that we are considering the demonstrable censorship to which radio is being subjected.

But before the actual censorship is examined the subject must be more thoroughly explored. There is a difference between censorship and editorial judgment in radio just as there is in journalism. Now and then some petulant person cries that his or her written emissions have been censored by the editor who will not print them. But there is not room in all the newspapers and magazines for one-tenth of the articles on the editorial desks, and there is not room on the air for one-tenth of the songs that might be sung and the stories that might be told.

THE radio editors are no more often moved by invidious motives than are the editors of newspapers. If an editor fails to get out an interesting publication, whether spoken or printed, he loses his job and the owner loses money. No editor with enough journalistic intelligence to carry copy to the copy-cutter would blue pencil an interesting item because his wife thought the wife of the man who wrote it is a dyed blonde who gets her stockings from a man who drives a big car. But a radio editor had better keep his eye on the dyed blonde. If the FCC should be told about her it would be just too bad.

Radio editors, owners, broadcasters, and their affiliations are apt to blame the FCC for their own faults of editorship. One of these days they will learn to stand on their own bottoms. They will be in a better position for

¶ "A NEWSPAPER *that publishes lies and scandal and malice is held responsible under the various laws. Damages may be assessed against the publication. If its editors are guilty of carelessness or libel they expose their employers to all sorts of penalties. This makes them careful, for an editor who reads copy too carelessly loses his job and a job lost for carelessness that costs the boss money is no recommendation to another prospective boss.*

fighting for their constitutional rights against an FCC which sometimes does some quaint things if they keep their own vests clean. A heavy-money advertiser would be refused the columns of a well-conducted newspaper if he tried to say in his advertisement things that should not be said. It makes no difference how much he pays for his space or how much the newspaper needs the money. The editor and business manager know that if they permit avoidable slanders or lies or obscenities to get into the paper they must face two powers that always punish. The first is public opinion. No filthy news-sheet ever made money except through blackmail. Decent Americans will not have it in their houses. The second is the courts. Because the press is free the courts look sternly on any effort to carry that freedom over a well-defined line. Under the Constitution it would seem that free speech—in this instance radio—should be held to the same rules.

But radio is censored. When the first radio law was enacted, in 1927, no one thought radio would grow up to be such a big girl. No one suspected then that there would be 20,000,000 radio receiving sets in the United States, nor that there would be 764 radio broadcasting stations of one sort and another. No one even dreamed that four coast-to-coast networks and twenty or thirty regional networks would have more or less complete control of almost one-half of the 764 stations which project the programs we listen to whether we want to or not at every minute of the day and night. No one thought the infant industry would transfer a total of one billion dollars annually from one set of pockets to another. But those who made that first law and the present act, which superseded it, did realize that there must be some engineering control of the new thing.

Not to go too deeply into this aspect of the situation, there is an international body to which all major and most minor countries more or less obediently bow. The International Convention has no authority, of course, but for convenience's sake the countries obey. This convention has set aside the broadcasting range between 550 and 1,500 kilocycles for the purpose of general broadcasting, although there are a few unimportant exceptions.

In the United States the Federal Communications Commission and its predecessors have divided this range among 90 channels, each 10 kilocycles wide. If the licensed stations on the 90 channels were properly regulated as to power used, kilocycles used, and hours used, and the programs sent out by the various networks and local stations were properly differentiated, it is the theory that everyone in the United States could tune in at any hour and get something or other, free from serious interference. In the areas served by the networks the citizen could have a wide choice of programs. In order to accomplish this desirable result the abovementioned 90 channels have been split up.

Forty have been given over to "clear channels." These operate with a minimum of 5 kilowatts and a maximum of 50 kilowatts. In principle only one station operates on each channel in the nighttime and not more than two in the daytime, as interference is much worse at night. In a general way these

Liberty of Speech and Press

"THE First Amendment to the Constitution provides that Congress shall not make any laws which shall abridge the liberty of speech or of the press. Free talk and free press are coupled in that amendment. The protection for the one is the protection for the other. But radio has been censored. The press has not been. More than once efforts have been made to censor it."

high-powered stations offer the only means of radio transmission to remote areas, which are not in the immediate neighborhood of a broadcast station. Four of the 90 channels have been assigned to high-powered regional stations, 40 as regional, and the remaining 6 as local stations. The terms explain themselves. The FCC's technical engineers have so arranged the factors of geographical distribution, the powers and frequencies used, and the hours of operation, that each station is at least in theory able to cover the district assigned to it, without too much interference.

So much for the engineering end. Congress feared that some form of control of radio broadcasting would be imperatively required. Congress had before it the control of the press by the public and the courts, which has been entirely effective ever since the United States had a press. There have been regrettable growing pains, of course, but the press has been free and it has held itself within the limits fixed by its dual control. But Congress did not think that similar liberties could be granted the spoken word. In the debates in Congress which preceded the enactment of the radio laws it was made definitely clear that no censorship was envisioned. The radio law contains the direct statement that no power of censorship is granted the commission. Then the law gave the power to the commission. So the commission insists that it does not censor. It merely controls.

It is permitted to issue 3- and 5-year licenses and it is its own judge as to the qualifications of the applicants for license. It may revoke a license at will. But if the commission were to revoke a license it would be compelled to give a reason for its action. If objectionable statements had been made over a station or over a network served by that station and the owners, the announcers, the business managers, and the editors of every station could prove that they lived cleanly lives, and that no other charge could be brought against them, the FCC would be forced to come out in the open: "This license or these licenses are hereby revoked because the commission finds that some of the things said over it or them have not been in harmony with the provision set by Congress in the radio law that the public interest, convenience, or necessity be observed."

THAT would be censorship. At least it would seem to be censorship to any one but some judges. Rather than take the chance of running head-on into that First Amendment, the FCC has made a rule that each station may be licensed for six months only. At the end of each period the station must appear to show cause why it should have its license renewed. If the commission does not wish to renew it there is very little, practically speaking, that the owner of a station can do about it. He has invested a certain sum in his equipment and has built up a business which is worth a great deal more in the open market because of its profit-making possibilities.

One Los Angeles radio station sold for upward of a million dollars. Whatever range there is between the cost of his equipment and his selling price is clear profit. Not many owners care to imperil their investment by defying the commission.

Some of them have.

Perhaps they did not know the FCC would be on them like a duck on a June bug when the things were said over their station to which the commission later took exception. The commission has never laid down any precise rules. It is possible to work out from a study of its decisions what cannot safely be said and by staying inside the decisions a moderate safety may be achieved. But it is not always possible to do so because the commission has the authority to issue a new decision at will. The commission reminds one of the gambler in one of Alfred Henry Lewis' Wolfville stories. He died, according to his epitaph, because he always insisted on making new rules for a game as he played along.

THE striking instance that comes to mind is that of the owner of a little 15-watt station in the Northwest.

His town had been split wide open by a political fight. The station owner permitted a third party to buy time in which the opposition faction was taken down the road with the dogs at its heels. The orator was admittedly savage in his attacks, and perhaps overstepped the bounds of decorum. If he had been an editor he could have been sued on so many counts if his editorial utterances had been of the same sort that he would have spent the rest of his life in court. Being aware of that fact he would not have printed them. The journalistic history of the United States may be cited as supporting evidence. Now and then an editor may bust loose, but if he does he pays for it. In this radio case the aggrieved parties appealed to the FCC. The FCC took away the license.

If that was not censorship, what was it?

Every owner of a station read that decision and got the handwriting on the wall by heart. But the court did not rule that the commission had been guilty of censorship, as specifically forbidden by the Constitution and the radio law. Instead the court ruled that the station owner was punished because he had not censored the utterances over his station to meet what the commission might think about them, although the commission had never given any indication of what those thoughts might be in an analogous situation.

THAT seems to me like the very worst sort of censorship, for it compels a back-breaking humility on the part of those to whom the Constitu-

tion had guaranteed that the right of free speech should not be impaired. But this is what a Federal court said: "The applicant may continue to indulge his strictures on the characters of men in public office. He may even indulge private malice or personal slander, subject, of course, to be required to answer for the abuse thereof . . ."

But he must do this in his strictly personal capacity. He may not make public what he thinks. It is as though the court were to rule that an editor who dislikes what the Federal government has done to the Commonwealth & Southern in the Tennessee valley might talk about it, if he wished, but that he must not write an editorial about it. For—

"He may not, we think, demand as a right the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the commission, may prescribe."

The only possible meaning one can read into that pronouncement by the courts is that the commission has been given authority by Congress to "prescribe" what may be said over the radio. And if that is not censorship, I again ask, what is it? But the court reverses me in advance. The court ruled that: "This is neither censorship nor is it a whittling away of the rights guaranteed by the First Amendment nor an impairment of their free exercise."

THIS ruling by the court is further sustained by the fact that radio is in interstate commerce whether it wants to be or not. Even the feeblest little station sends out waves that customarily do, or under certain conditions will, cross state lines. The courts have therefore ruled that under the constitutional provision providing for the regulation of interstate commerce Congress has authority to regulate radio. Since the regulatory provisions of the radio laws are a reasonable exercise of this power, the exercise thereof "is no more restricted by the First Amendment than are the police powers of the states by the Fourteenth Amendment."

So the courts have assented to censorship.

Many other cases might be cited. A doctor out in Kansas began to talk about goat glands to his invisible audience. He was not the discoverer of the goat gland panacea. The newspapers have been telling about the miracles that have been more or less wrought by the insertion of fresh animal tissue under the wrinkled skins of old gentlemen who for some time had not been taking

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notice. At least one novel was written around the same theme. Maybe the Kansas doctor went a bit too far in his eulogy of goat glanding, for the Kansas Medical Association objected. Perhaps the association was right. I have no means of knowing.

But the association appealed to the FCC and the goat gland specialist lost his license and was forced to repair to Mexico, where from the vantage point of a high-powered and thoroughly unrecognized station he raised merry thunder for a time.

A REFORMER in a western city attacked some of the local evildoers. The station lost its license. Nothing is more firmly established than that the station owner can lose his license if he permits anything to be said over his station to which the FCC objects even if the objection was prompted by those who smarted under what had been said. The process of license losing has been recently stepped up by the FCC at the orders of Chairman Frank R. McNinch, so that the station-owner's position is weaker than ever. That will be taken up later.

For this paragraph should be devoted to statements made by Senator Burton J. Wheeler, D. of Montana, who may possibly have an idea what Congress may do this session. Every one seems agreed that the FCC will have to face an investigation. Senator Wheeler thinks that the editorial ability shown by radio editors should be given a little prodding. He objects to being compelled to turn off his interest halfway through a program in order to listen to someone's blurb about some article which is for sale. He thinks that if radio does not go to the same trouble to make its output desirable by the public that journalism customarily does, it will run into trouble. Six minutes of yawp to nine minutes of entertainment is too much on a 15-minute program.

But the other aspects of radio are what really bother him.

IN time of war the President could do what he wants to do with radio, of course. No one would think of objecting to that. He could silence every station if he wished, or control every least inflection of the announcers. That is provided for in the law. He would not have the same right of control over the press, thanks to the First Amendment, but no one doubts that in time of war the press would likewise be loyally obedient. The peculiar quality of radio as a means of mass communication is that it might almost instantaneously inflame our whole population and that radio publication is automatically followed by the press. Whether or not free speech via radio is protected by that First Amendment, everyone knows that in wartime speech via radio would not be free.

That's all right with everybody.

But the law also provides that in times of "national emergency" the President may control the radio. No one knows exactly what is a "national emergency." Even the Supreme Court has turned away from that question. National emergencies have a way of moving into the tent nose first, like the camel in the story, and ultimately settling down to stay. We are all familiar with the history of the last few years. Senator Wheeler thinks it is highly important that radio be protected against unfair control "by some future President." He said that Hitler and Stalin

and Mussolini could not have gotten where they are today if they had not had control of radio. They began with national emergencies to draw to and when they filled their hand they had complete power over everything. Mr. Wheeler thinks it is always safe not to take unwise chances.

CONGRESS will, therefore, undoubtedly examine into the recent upheavals in the FCC's organization. Since this country went so heavily European in its language this particular upset has been called a purge. The rule had been that the FCC's examiners should make an independent examination into any case in which the conduct of a station might have offended the commission and turn the results of their labors over to the legal department. Likewise, applicants for primary permission to open a broadcasting station were looked up by the examiners. The needs of the community, the distance from other stations, the character of the program offered by the applicant, his financial soundness, and the probability that he could get enough advertising to make his station pay were only a few of the many inquiries made.

The plan seems to have worked very well. An independent set of examiners presumably got the facts and turned them over to the lawyers for further scrutiny. But at Mr. McNinch's direction the examiners have been subordinated to the lawyers and the lawyers have been moved so much closer to the chairman that it has been urged that practical control by the White House has been set up. It is not charged that at any time the White House has said to Chairman McNinch who has said to the head of the legal department who has said to the examiners that if they know where butter usually goes on bread they will bring in this sort of a report in the case of the man Smith at Whiffleburg. It is only pointed out that this relay of information is possible under the present set-up.

Radio is being censored now. Congress will certainly ask what may happen next.

"THE development of our rivers and harbors for water-borne traffic is essential not only to the peacetime prosperity of the country but also to preparation of national defense. The waterways of the country carry large tonnages more economically than the railroads and serve the demand for heavy and large traffic which is beyond the capacity of the railroads. The two types of transportation should not be regarded as competitive since from a broad national viewpoint they supplement each other in the development of river basins."

—JOSEPH J. MANSFIELD,
U. S. Representative from Texas.

THE NEW REGULATORY POLICY EMBODIED IN

The Civil Aeronautics Act

No. 2. Organizational Plan

In the preceding article (PUBLIC UTILITIES FORTNIGHTLY, April 27, 1939) the author discussed the history, general character, and scope of the new act. In the present article he points out the significance of its departure from the prevailing regulatory practice.

BY OSWALD RYAN
MEMBER, CIVIL AERONAUTICS AUTHORITY

CONFUSION appears to exist in many quarters concerning the organizational theory underlying the Civil Aeronautics Act of 1938. The act has been regarded by many as a new departure providing for the segregation of the executive, sometimes called administrative, functions which are always present and necessary for the implementing of the familiar quasi judicial and quasi legislative powers of regulation conferred by the Congress upon independent agencies. This supposed separation, in the new act, of administrative functions from those of a judicial and legislative character is currently believed to have resulted in the creation of a purely judicial and legislative tribunal free from the necessity of performing any administrative duties. The familiar union in a single body of the functions of prosecution and adjudication, long the target of critics of the administrative process, has thus been broken by those provisions establishing within the Authority an independent administrator clothed with specified executive powers. Such is the view of many who have regarded the Civil Aeronautics Act of 1938 as a departure from the traditional organizational method of effectuating regulatory powers. That view, in the opinion of the writer, is not supported by the provisions of the Civil Aeronautics Act.

THE fact that there should prevail in so many quarters a misconception of the organizational feature of the new statute is due, no doubt, to the fact that such a segregation of all exec-

utive functions was proposed at an early stage in the legislative history and that the proposal received wide publicity at the time.

The Civil Aeronautics Act, as will be shown, unites in a single 5-member body—the Civil Aeronautics Authority—all quasi legislative and quasi judicial powers conferred by the act *and all executive, that is, administrative functions necessary and incidental to the exercise of such powers.* The powers granted by the act to the independent administrator will be seen to be functions not found in the category of traditional regulatory powers. They are functions definitely nonregulatory in character, not incidental to the performance of judicial and legislative powers, but rather the purely executive functions of an operating agency. They are concerned, not with regulation, but with the construction, operation, and maintenance of aeronautical facilities and with experimentation.

THE new organizational feature in the Civil Aeronautics Act lies not in the creation of a purely quasi judicial and quasi legislative tribunal, but in the creation *in* the Authority of an "administrator" to whom are given certain purely executive powers involved in the establishment of airways, the establishment, maintenance, and operation of airway navigation aids, and certain executive functions of a promotional character.* In addition to these functions, the administrator is required by § 308 of the act to perform such powers and duties as may be assigned to him by the Authority. Assignable powers and duties are of a routine, administrative character. The Authority may or may not, in its discretion, assign any powers or duties to the administrator.

Reference to the legislative history of the Civil Aeronautics Act will help to clarify its organization features. During the 75th Congress and prior Congresses numerous bills were introduced for the regulation of civil aeronautics. Until the third session of the 75th Congress, however, none of these bills had contained the organizational features of the Civil Aeronautics Act. In January of 1938, when suggestions were made that all Federal functions in the field of aeronautics be vested in a single agency, the problem of the proper administrative organization of the new agency became an important one.

AS originally introduced in the House of Representatives by Congressman Lea, of California, the Civil Aeronautics bill[1] passed by the House in the third session of the 75th Congress did not create the office of "administrator." It contained when introduced, however, a provision that the chairman should be the "executive officer of the Authority."[2] It further provided:

> The exercise and performance of the powers and duties of the Authority which are not subject to review by courts of law shall be subject to the general direction of the President.[3]

The reasons which led to the insertion of these provisions in the original bill are found at length in the testimony of representatives of the Interdepartmental Committee on Civil Aviation Legislation[4] at the hearings on the bill before the House Committee on Interstate and Foreign Commerce.[5]

It was pointed out in that testimony that under the bill the Civil Aeronautics Authority would be vested not only with quasi legislative and quasi judicial functions, but also with important functions of a purely executive nature. The view was expressed that since Federal agencies exercising quasi legislative and quasi judicial powers were beyond the plenary control of the President,[6] some provision should be made to preserve the constitutional power of the Chief Executive to supervise the exercise of the executive functions conferred by the act. This was sought by providing that the executive work of the Authority[7] should be performed through its chairman, as "the executive officer," and that its performance should be under the "general direction" of the President. In substance, therefore, this bill created within an "independent commission" a division of powers as between quasi legislative and quasi judicial functions on the one hand and executive functions on the other.

THE hearings on the bill in the House were held at about the time the government reorganization bills were pending in Congress. From time to time throughout these hearings various members of the House committee asked whether or not the provisions of the bill embodied the principles of the reorganization proposals.[8] This was denied, and it was stated[9] that the scheme of organization of the Authority was "far removed" from the plan for the reorganization of the regulatory commissions proposed by the Brownlow committee.[10] After the close of the hearings on the original bill the House committee amended it in executive session and it was during those sessions that the provisions creating the administrator were inserted. On April 28, 1938, the committee reported the bill to the House.[11] This bill establishing the office of administrator was in form similar to the final act, with the exception that in the latter the power of the Authority to assign powers and duties to the administrator was greatly curtailed.[12]

In the Senate, several different bills were introduced during the third session of the 75th Congress dealing with the regulation of civil aeronautics.[13] None of these, including the bill finally passed by the Senate,[14] created the office of administrator, and, although each made the chairman of the Authority the "executive officer" of the Authority, no general provision was

¶ "THE *Civil Aeronautics Act of 1938 is sometimes cited as an answer to current criticisms of Federal regulatory bodies. Independent agencies of Congress by their critics have frequently been called irresponsible, independent bodies, embodying an improper mixture of policy-determining or legislative functions, and functions of a judicial nature. It is charged that this union in the same body of the quasi legislative function of rule making and the function of adjudication surrounds the tribunal with a nonjudicial atmosphere.*"

made that any executive functions of the agency should be performed under the direction of the President.[15]

THE existence of the administrative problem, raised by the fact that purely executive functions of a proprietary character were conferred, was recognized, however, during the debates in the Senate on the bill which reached the floor.[16] That bill contained a provision[17] limiting the President's power to remove from office the members of the Authority except for certain specified causes. An amendment was proposed on the floor of the Senate striking out this limitation and was supported on the ground that since executive functions were vested in the Authority, it was essential, if the President were to retain his constitutional control over the exercise of those functions, that no limitation be placed upon his power to remove the officers in whom they were vested.[18] The amendment was adopted by the Senate but was later eliminated by the conferees.

In the conference between representatives of the Senate and House on the differences in the bill as passed by the respective bodies, the conferees for the Senate accepted the provisions of the House bill creating the administrator, and, in addition, a provision limiting the President's power to remove members of the Authority. Some changes in detail were also made by the conferees in the provisions of the House bill dealing with the administrator's powers.[19]

The conference report was adopted in the Senate without debate on the provisions concerning the administrator.[20]

UNDER § 308 provision is made, as previously pointed out, permitting the assignment of duties by the Authority to the administrator. What powers and duties does the act contemplate may be assigned? The bill as it passed the House provided that the "administrator shall exercise and perform the powers and duties vested in and imposed upon him by this act and such other powers and duties as may be assigned to him by the Authority." The House report on this bill explains that provision by stating that "He [the administrator] would also perform such *routine administrative duties* as the Authority *might* assign to him." (Italics supplied.) The placing of a similar interpretation upon § 308 of the final act is supported by the fact that the section prevents the Authority from assigning to the administrator any powers conferred under §§ 202, 203, 204, and 206, or any powers and duties under Titles IV and VI of the act. The four sections referred to deal mostly with the executive power to appoint officers and employees and the general powers of the Authority to make rules and regulations for carrying out the provisions of the act. The powers and duties conferred by Titles IV and VI cover the quasi legislative and quasi judicial functions, such as the issuance of operation and safety certificates, permits, fixing of airmail rates, regulation of consolidations, mergers, and acquisitions of control, and similar functions.

IT seems clear that the Congress did not intend that the Authority should assign any of its quasi legislative or quasi judicial or important executive powers, such as its power to

Creation of Administrator

"THE new organizational feature in the Civil Aeronautics Act lies not in the creation of a purely quasi judicial and quasi legislative tribunal, but in the creation IN *the Authority of an 'administrator' to whom are given certain purely executive powers involved in the establishment of airways, the establishment, maintenance, and operation of airway navigation aids, and certain executive functions of a promotional character."*

appoint staff personnel, but should be limited to the assignment of routine administrative duties. It further appears that any assignment was to be entirely at the Authority's discretion.

The administrator is *potentially* a dual personality under the act. Although "in the Authority," yet he occupies practically an independent status in exercising the specific proprietary (as distinguished from regulatory) powers conferred upon him by the statute since he does not receive his appointment or hold his office at the will of the Authority. But, in exercising powers and functions which the Authority by order from time to time may require him to perform, he acts as an agent of the 5-member Authority, subject to its control and supervision, since the Authority may cancel the assignment at its discretion.

THE Civil Aeronautics Act of 1938 is sometimes cited as an answer to current criticisms of Federal regulatory bodies. Independent agencies of Congress by their critics have frequently been called irresponsible, independent bodies, embodying an improper mixture of policy-determining or legislative functions, and functions of a judicial nature.[21] It is charged that this union in the same body of the quasi legislative function of rule making and the function of adjudication surrounds the tribunal with a nonjudicial atmosphere.

A second charge frequently offered deals with the union of administrative and judicial powers. It is said that the neutrality of the independent agency suffers from the fact that it combines the function of prosecutor and judge.

The commission, it is said, promulgates regulations, institutes investigations of alleged violations of those regulations, adopts complaints against the alleged violators, and then passes judgment upon its own cases.

On the other hand, many other students of the problem, among them Dean James M. Landis of the Harvard Law School, former chairman of the Securities and Exchange Commission, feel that intelligent coördination between policy making and enforcement argues against the separation of powers, and that to place adjudication outside of the administrative process would threaten the execution of policies.[22] A third argument advanced against the administrative process is that the agency is greatly handicapped in the performance of its quasi judicial functions by being burdened with executive tasks. (The executive tasks referred to are the administrative functions incident to the discharge of quasi legislative and quasi judicial powers, such as the appointment and supervision of personnel, the collection of information, and the preparation of a record as a basis of quasi legislative and quasi judicial decisions and orders.)

It appears that Congress in the new act was influenced by the opinion that the Authority should not be burdened by the responsibility for the performance of purely executive functions outside of those which are incidental to the exercise of legislative and judicial decision. The executive functions involved in the establishment of airways, the establishment, maintenance, and operation of air navigation aids, and the conducting of experimental work were functions unlike those administrative functions which are conferred upon regulatory bodies. "The reason for so organizing this new agency . . . is to permit the new agency to exercise its functions smoothly and efficiently," the House committee said in explaining the creation of the office of administrator in reporting the House bill.[23] It was believed by that committee that the Authority, if burdened with the necessity of performing functions such as the construction and operation of air navigation aids, could not properly carry out its regulatory duties. Also, it was thought that the establishment of airways and the construction of air navigation facilities and landing areas could be supervised by one man more efficiently than by a 5-member board.

The Civil Aeronautics Act of 1938, however, leaves untouched the traditional union of regulatory powers which characterizes the major independent agencies of Congress. In this respect the 5-member Authority does not differ from agencies such as the Interstate Commerce Commission, Securities and Exchange Commission, Federal Trade Commission, and the Federal Power Commission. Those agencies exercise the quasi legislative power to make rules and regulations, the quasi judicial power to impose penalties for violations, and the executive[24] power involved in the appointment and supervision of personnel, the investigation of applications and complaints, and the collection of information and evidence to be used as a basis of commission decisions and orders, and, in the case of the Interstate Commerce Commission, the function of safety inspection. Such agencies do not exercise purely executive powers such as the construction, maintenance, and operation of air navigation aids which are given to an independent administrator in the Civil Aeronautics Act.

The Federal Power Commission, for example, is given authority, by Title II of the Public Utility Act of 1935, to *regulate* electrical transmission and interconnection facilities, but is without the executive power to *construct, maintain,* or *operate* such facilities. Again, the Interstate Commerce Commission is empowered to *regulate* railway block signal systems and train control devices, but is without the executive power to *construct, maintain,* or *operate* such facilities.

The Civil Aeronautics Act, in segregating specified executive powers in an administrator, recognizes the fundamental distinction between the purely executive functions of an operating agency and the legislative, judicial, and administrative functions of a regulatory agency.

NOR is this conclusion as to the administrative theory of the Civil Aeronautics Act altered by the fact that the act provides that the Authority may assign powers and duties to the administrator. The administrator, as previously stated, acts as the agent of the 5-member Authority and is subject to its control and supervision *when he exercises any duty imposed upon him by the Authority.* The Authority, in using the administrator to aid it in the performance of its administrative functions, still exercises those administrative powers exactly as if the administrator had been appointed and held office at the will of the Authority. Indeed, the administrator, in exercising powers recognized by this section, in effect, holds office at the will of the Authority, since the Authority may cancel the assignment at any time it chooses to do so. It would appear, therefore, that § 308 is not a device for segregating any powers or functions granted by the act to the Authority.

This interpretation of the Civil Aeronautics Act has been adopted by the Authority in its orders setting up its organization. It was deemed desirable to accomplish a unified policy and administration with respect to the purely executive powers conferred by the act upon the administrator and the powers conferred by the act upon the Authority. To achieve this the Authority, resorting to its power recognized by § 308, assigned certain routine supervisory and administrative duties over two of the staff units that deal with safety and economic regulation. In its order, however, it provided that the administrator, in the exercise of such supervisory duties, would serve as *"supervisor for the Authority, responsible to and serving at the will of the Authority";* and that *"the Authority shall maintain a continuing super-*

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visory control over the policies and personnel" of these staff units.

WHILE the Civil Aeronautics Act does not provide for the segregation of the functions of prosecutor and judge, the Authority by recent order has undertaken to segregate *within its staff organization* these functions. An "Assistant General Counsel for Economic Regulation" has been set up to act as advocate or prosecutor on behalf of the public interest in all formal cases before the Authority. This officer, although responsible to the Authority, has considerable leeway and freedom from interference by the Authority in the discharge of his duties. The administrator exercises no functions with respect to this officer or his activities. The Assistant General Counsel for Economic Regulation inquires into all economic cases such as those involving rates, certificates of public convenience and necessity, consolidations and mergers, and similar economic cases, and where he deems the public interest requires it, he appears at formal Authority hearings and makes formal contentions against the granting of applications or for the prosecution of penalties.

The Authority's Bureau of Economic Regulation collects, analyzes, and interprets information to provide the necessary basis of fact for the judicial determination of cases, but will not participate in an advocate or prosecutor rôle in cases heard by the Authority.

TO summarize: It seems clear, not only from an analysis of the Civil Aeronautics Act, but also from the administrative interpretation which the Authority has placed upon it, that the new statute does not disclose any departure from the traditional form of administrative organization which characterizes Federal regulatory bodies; that the act clearly vests in the single regulatory body of five members all quasi judicial powers, all quasi legislative powers, and *all executive powers incident to the exercise of such quasi judicial and quasi legislative powers;* and that the only powers conferred by this act which are segregated are those clearly executive functions of an operating, as distinguished from a regulatory, agency. These operating functions are vested in an administrator, who is located within the Authority but is independent of the Authority. Thus, we find under the same administrative roof an independent regulatory agency of Congress —the Civil Aeronautics Authority; an independent operating agency exercising purely executive functions and responsible to the President—the administrator; and an independent investigatory agency—the Air Safety Board. The two last-named agencies are required by the act "to coöperate with the Authority" in administration of the act.

Footnotes

*Under the direction and control of the administrator, there are 44 designated civil airways in the United States and its territorial possessions, having a total mileage of approximately 25,400 miles. Along these civil airways there are 13 airway traffic control stations; 298 intermediate landing fields; 190 radio-range beacon and communication stations; 2,130 airway beacons; 57 nondirectional radio marker beacons; 35 ultra-high frequency

radio fan-type markers; and over 30,000 miles of teletype communication circuits, serving 358 different stations with weather reports and other information necessary to safe air navigation. A total of 2,662 employees of the administrator are engaged continuously in the construction, maintenance, and operation of these air navigation facilities; and the services of 1,903 of these persons are devoted exclusively to the communication systems. These aids to air navigation are available alike to the military pilot, the private flier, and the common carrier of the air engaged in the transportation of passengers and mail.

[1] H.R. 9738. Immediately after the passage of this bill by the House, its text was substituted by the House for the text of S. 3845, previously passed by the Senate, and the bill consequently went to conference as S. 3845.

[2] Section 201(a).

[3] Section 801(a).

[4] That committee was composed of representatives of the Federal executive departments of State, War, Navy, Post Office, Commerce, and Treasury.

[5] See Hearings on H.R. 9738, pp. 37-39, 48-55, 136-138, 144-149, 408, 414.

[6] Humphrey *v.* United States (1935) 295 U.S. 602, 79 L. ed. 1611.

[7] The executive functions were described in § 801(a) of the bill as those "which are not subject to review by courts of law."

[8] See Hearings on H.R. 9738, pp. 52, 73, 75, 76, 149.

[9] Ibid, p. 52.

[10] Report of the President's Committee on Administrative Management, Senate Document No. 8, 75th Congress, 1st Session.

[11] House Report No. 2254, 75th Congress, 3rd Session.

[12] Section 305 of the bill reads: "The administrator shall exercise and perform the powers and duties vested in and imposed upon him by this act and such other powers and duties as may be assigned to him by the Authority." The act exempts from this assignment of power powers granted by §§ 202, 203, 204, and 206, and the powers and duties under Titles IV and VI.

[13] S. 3659, S. 3760, S. 3864, S. 3845.

[14] S. 3845.

[15] It should be noted, however, that S. 3845, as well as H. R. 9738 and the final act, provided that the issuance, amendment, etc., of certificates for overseas and foreign air transportation and permits to foreign air carriers should be subject to the approval of the President. This was in recognition of the problems of national defense and foreign affairs arising in connection with such certificates and permits.

[16] S. 3845.

[17] Section 201(a).

[18] *Congressional Record,* Vol. 83, pp. 6854-6869.

[19] Conference Report, House Report No. 2635, 75th Congress, 3rd Session.

[20] *Congressional Record,* Vol. 83, pp. 11909-11.

[21] The criticism of the prevailing administrative process for its union of legislative, executive, and judicial powers was the subject of a special study by the National Association of Railroad and Utility Commissioners at its 1938 meeting at New Orleans.

[22] See Landis, James M.—"The Administrative Process," page 98.

[23] House Report No. 2254, 75th Congress, 3rd Session.

[24] Sometimes called "administrative."

Utility Plants As "Objectives" for Aerial Bombardment

THE only rules governing aerial bombardment which have been proposed to the major powers are the 1923 Rules of Air Warfare, as reported by the Commission of Jurists to The Hague. These rules seek to alleviate the cruelty of indiscriminate bombardment of noncombatant areas in time of war by listing "military objectives." True, these rules were, according to neutral observers, flagrantly disregarded on occasion during the recent war in Spain. Nevertheless, for what they are worth, the rules do not seem to include utility plants as military objectives.

Dr. M. W. Royse, in his volume, "Aerial Bombardment," commented on this point rather skeptically as follows:

"Under the Hague Rules it appears, therefore, that mines and oil wells, as well as gas works, electric power stations, and factories engaged in producing unfinished products, such as the pig-iron produced by blast furnaces, will not constitute military objectives. Such objectives, however, form tempting targets for the military forces. Military economy will mark such objects for destruction since they not only constitute a basic element in war material but can be destroyed at the minimum expenditure of energy and personnel. It remains to be seen whether such objectives will be spared in actual warfare."

Wire and Wireless Communication

THERE seems to be developing a small-sized feud between the United States Court of Appeals for the District of Columbia and the Federal Communications Commission. At any rate, a petition filed in that court by the FCC counsel for a rehearing on a case involving the Pottsville Broadcasting Company used such plain language that it attracted attention of Washington observers who are now waiting to see what Chief Justice Groner or other justices of the District of Columbia Court of Appeals will have to say to charges made in the FCC petition that that court is usurping the functions of an administrative branch of the government.

It was Chief Justice Groner who, in remanding the Pottsville Broadcasting Company Case on April 3rd, rebuked the FCC with a sharp reminder that Federal administrative agencies must follow the law just as courts do. The Pottsville Case arose in 1936 when the Pottsville Broadcasting Company asked for a license which the FCC denied on grounds that the chief stockholders do not live in Pottsville and that there was not sufficient proof of the applicant's financial ability.

On the original appeal the court reversed the FCC on both points and remanded the case with a virtual direction to the FCC to issue the license requested. Instead, the FCC opened the entire matter from the beginning and ordered the Pottsville Company to compete for its license with other applicants. Justice Groner on a second appeal denounced this action as a "definite intention to disregard" the mandate of the court. He then remanded the case for the second time with a prohibition against the FCC considering any further evidence than already had been put into the record.

Still smarting from this rebuke, the FCC moved for a rehearing with more than a gentle hint that unless the same were granted, a higher appeal would be taken to the United States Supreme Court.

THE FCC general counsel, William J. Dempsey, contended that in forbidding the FCC to consider further evidence in the Pottsville Case, the court was in effect telling the commission how to administer its affairs. He contended this was outside the jurisdiction of the court.

Furthermore, it was indicated that in the event the court insists on its original decision, the commission will take the matter to the United States Supreme Court for a decision. As a matter of fact, it requests the court, in the event it denies the commission's petition, to enter judgment and stay the execution pending application to the highest court for a writ of certiorari.

Since the original decision in the Pottsville Case, another station in the same place filed an application for a construction permit, and the commission is ready to make decision but held it up pending the court's decision in the current case. The court, however, according to commission counsel, held that the applica-

tions of the two stations could not be considered on a comparative basis but that the future action of the commission in the Pottsville Case must be confined to the record of the commission's original proceedings.

The commission said that it did not believe that the court's decision of April 3rd last gave due weight to primary responsibility of the commission under the Communications Act of 1934 to execute the statute in the interests of the public and will necessarily lead to results which subordinate the interests of the public to private interests of particular applications before the commission. The commission added that it felt constrained to file the petition because it believed that the court has invaded a field which the Supreme Court of the United States has held is not the province of the district court of appeals.

It is the contention of commission counsel that when the local court decides a case on appeal from the Federal Communications Commission, the proceeding is terminated, and although the commission is required to respect and follow the court's judgment in the exercise of its administrative functions, the commission still has the same duties to perform under the statute as it had prior to the time an appeal is taken. Obviously, it was pointed out, the court cannot be invested with the judicial power of the United States and also be authorized to exercise the executive power of the United States since the exercise of both executive and judicial power of the United States cannot under the Constitution be lodged in the hands of a single person or agency.

The court is told that it is not a commission or a superior executive agency, and the commission is not a court. In fact, it was added, the power of the local court over the commissioners is, if anything, less than its power over other parties before it because it cannot compel the commissioners to act in their official capacity as members of the executive department or government in any way which would be tantamount to the court exercising an executive power.

It is logical inference from the decision of the District of Columbia court, the commission said, that the commission may at all times be controlled by the court in the performance of the commission's functions under the Communications Act of 1934 to the same extent as an appellate Federal court may control the performance of a lower court of its judicial functions. The procedure to be followed by the commission in arriving at its determination in a case was not and is not subject to court control, either before or after the appeal, it was asserted. The FCC believes this is still an administrative and not a judicial function.

* * * *

California has joined the considerable list of states which have abolished the extra monthly charge for hand-set type telephones. Such was the announcement made on April 18th by the president of the California Railroad Commission, Ray C. Wakefield. At present there is a 10-cent monthly charge for the hand-set type of telephone throughout the territory served by the Pacific Telephone & Telegraph Company and the Southern California Telephone Company. This special charge would be eliminated on all telephone bills after July 1st.

The abolition of the hand-set surcharge is estimated to save California telephone subscribers approximately $250,000 a year. It was also regarded as likely that the companies will have to make a substantial investment of approximately $450,000 in additional equipment to meet the expected demand for new hand-set telephones.

* * * *

The National Labor Relations Board surprised Washington observers to some extent in its final action on April 22nd in the long-awaited Wisconsin Telephone Company Case. On that date, the board, by a 2-to-1 vote, dismissed charges of company domination against the Independent Union of Telephone Operators, although it certified at the same time the International Brother-

hood of Electrical Workers (AFL) to be the union representative for the company's employees in four of its smaller exchanges.

As a practical matter, this probably means that the NLRB has decided to allow the Independent Union of Telephone Operators to function as the labor representative for the balance of the Wisconsin Telephone Company employees—which include 95 exchanges. This latter conclusion would necessarily come by inference rather than direct rule of the NLRB for the simple reason that the Independent Union of Telephone Operators had never requested from the board official approval of its claim to representation. As a result of this action of the NLRB majority (Member Edwin S. Smith dissenting), the NLRB trial examiner's findings about company domination of the independent union were reversed.

The majority of the board concluded that the telephone company had dominated a former association of its employees to a varying degree up until July, 1937, but that the independent union which was formed at that time upon the basis of a voluntary referendum could not be fairly regarded as incapable of collective bargaining or as a so-called "company union." In its formal order, the NLRB ordered the company to cease and desist from dominating or interfering with the formation or administration of any labor organization of its employees or contributing support to any such labor organization. The majority opinion was signed by Chairman Madden and Associate Member Donald Wakefield Smith.

Associate Member Edwin S. Smith, in his dissenting opinion, felt that the trial examiner was correct in his conclusion that the independent union continued to be dominated by the utility company, notwithstanding steps taken ostensibly to insure its independence. For that reason, he said that the Wisconsin Telephone Company "should be ordered to withhold recognition from the independent as a collective bargaining agency."

The direction of the majority opinion is unmistakably away from the course charted by the NLRB in its earlier decisions affecting the so-called independent unions. Indeed, at one time independent union officials feared that the board was preparing to outlaw, as a "company union" incapable of truly independent collective bargaining, any organization not affiliated with either the American Federation of Labor or with the Congress of Industrial Organization. There was considerable speculation in Washington as to whether recent criticism of the board's drastic pro-union policy might have had some effect in softening the board's attitude towards unaffiliated union organizations, which could make a reasonable showing if they were truly free from employer influence.

* * * *

THE House Labor Committee finally voted out the Norton bill to amend the wage-hour law. In its final vote, the committee approved a change which will liberalize the exemption of small telephone exchanges from application of the Fair Labor Standards Act of 1938 to include those exchanges having 500 subscribers or less. In the form originally introduced by Chairman Norton, the maximum exemption was 350 subscribers. Whether the bill would be further liberalized on the Senate side was a matter of speculation, complicated by controversy over other sections of the Norton bill—principally those affecting agricultural production. Chairman Norton hopes to have the bill brought to a vote before the end of May, and it is generally supposed that there is a good chance that such will be the case, unless unexpected pressure on Congress resulting from international emergencies should sidetrack the legislation.

Incidentally, Assistant General Counsel Rufus Poole of the Wage-Hour Administration has been moved up to succeed General Counsel Calvert Magruder, who was recently named to the bench of the First Circuit Court of Appeals.

* * * *

THE British government is preparing to take over the British Broadcasting Corporation, which enjoys a radio

broadcast monopoly in Great Britain, and utilize it as a powerful propaganda weapon in its "peace front" fight, it was reported on April 22nd by the *Daily Mail*. The dispatch asserted that the government would assume direct control June 7th, and that the network would become a government news service and all stations would constitute a potential, and to some extent actual, propaganda machine for the government.

It was added that all broadcast news bulletins would be strictly supervised, that talks made on the BBC network on important topics would become official ones, and that the radio facilities would be used to broadcast recruiting and similar appeals.

At present the BBC is neither a commercial company nor a governmental department. It was created by royal charter on a basis similar to that of the Bank of England. Its controlling board of governors, chairman, and vice chairman, are all appointed by the Crown. A clause in the charter authorizes the government to take over the company "if and whenever in the opinion of the Postmaster General an emergency shall have arisen in which it is expedient for the public service that His Majesty's government shall have control over the transmission of messages."

Under government control, entertainment programs over the BBC network would be continued as at present. But the government would be in direct and active control and all facilities would be available at all times for official use.

* * * *

REPRESENTATIVE Lawrence J. Connery of Massachusetts on April 26th renewed his demand for investigation of the FCC in a bitter attack on the value of the commission's radio investigation. Speaking on the floor of the House of Representatives on that date, Mr. Connery said in part:

> Mr. Speaker, permit me to say that a congressional investigation of the Federal Communications Commission and the radio monopoly will show that the Communications Act of 1934 is openly, flagrantly, and continually violated without any action or restraint on the part of the Federal Communications Commission. The law specifically requires the commission to find that the licensee or grantee shall serve public interest, convenience, and necessity. Naturally those network officials residing in New York city, with no knowledge or interest in what constitutes public interest, convenience, and necessity in thousands of our communities throughout the United States, cannot know let alone serve as the Congress intended public interest, convenience, and necessity.
>
> Mr. Speaker, many members of the House seemingly overlook the interest which the American listening public has in the proper regulation of radio broadcasting. It is my understanding that official records reveal that Mr. John Q. Public has invested more than $2,000,000,000 in radio receiving sets while the total investment of radio broadcasters in 629 stations is less than $50,000,000.
>
> With this investment of $50,000,000 plus possession of these invaluable grants from the government, for which they pay nothing to the government, their reported net profits last year, after paying all taxes, were some $18,000,000.
>
> Surely, Mr. Speaker, with the radio monopoly about to unload upon an unsuspecting public television sets, the value of which at this time, according to the newspapers, competent radio engineers question, is it not about time that the Congress, acting in the public interest, insisted upon a congressional investigation of the entire radio subject?

Referring to the FCC's own investigation of radio networks, Mr. Connery said that the commission had been going "through the movements of conducting a so-called investigation, but that has been going on for several months, and, of course, it will end in the usual whitewash . . . "

* * * *

THE Pennsylvania Public Utility Commission on April 25th reopened hearings in the commission's rate case against the Bell Telephone Company of Pennsylvania. The hearings were held in Philadelphia and were scheduled to go on for four days. Encouraged by its recent United States Supreme Court victory in the Edison Light & Power Company Case, in which a statutory power to make temporary rates was upheld, the commission may hand down a temporary rate order in the Bell Telephone Case, although it has so far been a general investigation, involving statewide rates.

Financial News and Comment

By OWEN ELY

Supreme Court Majority Clings To Fair Value Rule

WHILE the Supreme Court's decision in the so-called "York Case," decided April 17th, was against the interest of the utility company involved—the court upholding the validity of a temporary electric rate cut by the Pennsylvania commission—the special concurring opinion of Mr. Justice Frankfurter reveals a majority of six justices still refuse to abandon the historic Smyth *v.* Ames valuation rule in favor of outright adoption of the original cost theory or any of its variations. (Mr. Justice Douglas did not participate.)

The special concurring opinion demonstrates this even more clearly than the majority opinion by Mr. Justice Reed, which was more or less general in its treatment of the controversial valuation question. As a matter of fact, the Reed opinion sidestepped the issue over valuation theories as being unnecessary and concluded that the rate fixed by the state commission did not result in confiscation. This finding of the Reed opinion was based upon the Pennsylvania commission's profession that it had, in effect, taken into account the various elements of value required by Smyth *v.* Ames and had allowed a 6 per cent return thereon. The fact that the Pennsylvania statute might, by its own terms, have been applied in such a way as to limit the rate base to "original cost" and the return to "not less than 5 per centum" was held to be an immaterial consideration by the court's majority.

Justice Frankfurter's opinion, concurred in by Justice Black, chided the court for basing its decision as to fair rate making upon the Smyth *v.* Ames Case, decided in 1898. He contended that in reversing the Pennsylvania Case (Denis J. Driscoll et al. *v.* Edison Light & Power Company) the court's opinion "appears to give new vitality needlessly to the mischievous formula for fixing utility rates in Smyth *v.* Ames."

Intervening as "friend of the court," the government, through Solicitor General Jackson, had filed a brief asking the court to throw overboard the old Smyth-Ames decision and give a ruling directly on the basis of original cost or its more modern variation — "prudent investment." Mr. Jackson argued that the rule of fair value, with its requirements of consideration of reproduction cost as set out under the old precedent, had produced results which were unreliable, "arbitrary, and absurd." He said further:

> The rule of prudent investment, combining as it does exactness, ease of application, and proper principle for the determination of just compensation, is the standard for rate making best adapted to modern business conditions and practices in this country. The case at bar offers the court an opportunity to write off the book an unsound and unworkable rule of rate making.

JUSTICES Frankfurter and Black in their opinion held that

> the determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment. These are matters for the application of whatever knowledge economics and finance may bring to the practicalities of business enterprise. The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural

safeguards in the exercise of legislative powers which are the historic foundations of due process.

At one point Justice Frankfurter termed the precedents laid down in Smyth *v.* Ames as so much "mumbo-jumbo." He insisted that such a doctrine should not be invoked when it is not necessary to do so.

The York Case was thus, perhaps, somewhat disappointing to those observers who had been expecting that it would provide a clear-cut test of the attitude of the court, as presently constituted, on the fundamental issue of valuation theories involved in Smyth *v.* Ames. That only a minority of two members of the present court came out unequivocally against Smyth *v.* Ames is somewhat of a coincidence in view of the fact that the last time this issue was presented to the court in a clean-cut test — the Southwestern Bell Case in 1923—there were also two members who were disposed to make a formal departure from Smyth *v.* Ames, former Justice Brandeis and the late Justice Holmes.

It may be that the youngest member of the court, Mr. Justice Douglas, may augment the Frankfurter-Black minority on this subject. It may even be that in a more decisive test in the future—in which there would be no chance for the court to avoid either a formal confirmation or outright repudiation of Smyth *v.* Ames—other members of the majority of six who joined Mr. Justice Reed in the York Case may feel differently about the matter. For the utility industries at large, the most significant feature of the York Case is that Smyth *v.* Ames is still apparently the law with respect to the determination of the utility rate base by regulatory authorities.

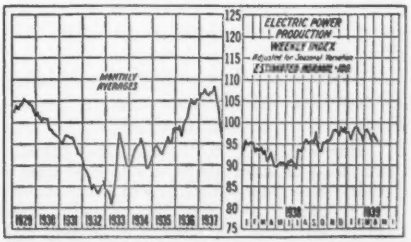
New Financing

NEW utility issues in the fortnight ended April 22nd included 223,063 shares of Consolidated Gas of Baltimore 4½ per cent preferred stock at $112.50, offered by a syndicate headed by White, Weld & Company (subject to exchange rights of existing preferred stockholders); $3,800,000 West Coast Telephone Company first 4s of 1964 offered at par by a syndicate headed by Blyth & Co., Inc.; and 15,000 shares $5 preferred stock and 60,000 shares of common stock of Jamaica Water Supply Company, also offered by Blyth.

The Jamaica Water preferred issue apparently found a ready institutional market. The common stock was offered at 33, with reported earnings of about $3.50 a share and an indicated dividend rate of $2.

The new Baltimore Gas preferred should rank with the best preferred stocks, the offering price being equivalent to about a 4 per cent income basis. While this is a fairly low yield for utility issues, several industrial preferreds now yield about 3½ to 3¾ per cent. Consolidated Gas earned its combined charges and preferred dividends 2.3 times in 1938, and requirements on the new 4½ per cent preferred were covered nearly six times. The company, whose business dates back to 1817, had already (in 1938) refunded its former issues of preferred which paid 5½ to 8 per cent. With the redemption price on the new 4½ per cent stock fixed at 115, it is unlikely that a third refunding will ever occur.

Underwriting arrangements for the Consolidated Gas issue were unusual in that they provided a graduated scale of commissions. According to the offering prospectus, the underwriters will receive 50 cents a share on the entire amount, but then will realize $1.25 a share on the first 20,000 shares taken, $2.25 a share on the next 30,000 shares, and $3.25 a share on all over 50,000 shares which



From The New York Times

might have to be taken down by the group.

Pacific Lighting Corporation on April 17th registered with the SEC 200,000 shares of no-par value $5 preferred stock. The stock is to be offered in exchange to holders of the company's $6 dividend preferred on the basis of one share of new preferred and $3 in cash for each share of old preferred. The exchange offer was to expire May 11th. Any of the shares not taken under the exchange offer are to be purchased by a group of underwriters headed by Blyth & Co., Inc. The stock will be offered to the public at not more than $102 a share, and the underwriting discount will vary from a maximum of $4 to a minimum of $2 a share, depending upon the number of unexchanged shares taken down by the underwriters. The prospectus states that in order to facilitate the offering it is intended to stabilize the price of the new preferred stock.

Colorado Central Power Company plans to sell $725,000 first 4½s due 1959 to the John Hancock Mutual Life Insurance Company of Boston at 102½.

The issue of $62,500,000 Gatineau Power Company 3¾s due 1967, having been held over from day to day due to nervousness over the international situation, was offered April 24th.

Competitive Bidding Rule Clarified

In approving conditionally recent financing by Northern States Power Company, which had been sought by two important banking houses, the SEC has cleared up some of the confusion over the question as to whether utility companies must adopt competitive bidding methods.

Pointing out that competitive bidding is required only under certain conditions, the commission stated:

> Our Rule U-12F-2, promulgated December 28, 1938, effective March 1, 1939, affects only those transactions in which the underwriter stands in one of the following relationships to the declarant or applicant: (1) is in the same holding company system, (2) is an affiliate, (3) bears such a relationship that there is "liable to be or to have been an absence of arm's-length bargaining with respect to the transaction."
>
> If the underwriter falls within one of these classes and receives more than a 5 per cent participation in the underwriting, he is prohibited from receiving a fee unless there is a showing that appropriate and diligent effort was made to obtain competitive bids, or that such effort was not practicable.

Public Service May Acquire Jersey Central

Chairman of the Board Thomas N. McCarter, at the recent annual meeting of Public Service Corp. of New Jersey, stated that negotiations were under way which might result in the acquisition of Jersey Central Power & Light Company. This apparently means that an end of the long struggle between Associated Gas interests and Public Service for control, is in sight. Jersey Central is controlled through collateral by the debenture holders of bankrupt National Public Service Corporation. Substantial investments in the latter company's securities have been made by both Associated and Public Service, who have been fighting for control of 68 per cent of the company's common stock pledged under National Public Service debentures. Auction of the stock has been postponed from time to time by the trustee, New York Trust Company, the latest scheduled date having been May 3rd.

Regarding possible acquisition of control of Jersey Central by Public Service the *New York Sun*, in "The Investor's Column," points out that this might result in a substantial saving in interest charges:

> It is possible that with Jersey Central, a part of the Public Service system, the parent company would adopt the method employed by Consolidated Edison of New York on three occasions to inject the strength of its own credit into the obligations of subsidiaries. This happened in the case of Westchester Lighting Company, Yonkers Electric Light, and New York Steam.
>
> Jersey Central has outstanding $10,225,000 of 5 per cent bonds, due in 1947 and

redeemable at 101¾ and $32,000,000 of 4½s, due in 1961, and redeemable at 104. Redemption premiums on these would cost $1,458,937, which would have to be considered in fixing the terms of a new issue. In addition, the company must consider unamortized debt discount, which amounted to $2,752,268 at the end of 1938. Together, these items amount to $4,211,205. It would not be possible to charge this sum against surplus, for that amounts to only $3,430,545. Most states require that these items be written off.

By fixing a 3¼ per cent coupon on the new issue, however, the company would have ample margin of premium to take care of the redemption premium on old bonds. Public Service Electric & Gas 3¼ per cent bonds are selling around 110. If a net premium of even 7 per cent is obtained on a Jersey Central 3¼ per cent issue, guaranteed by Public Service, the premium will be close to $3,000,000.

At a rate of 3¼ per cent on a refunding issue, the interest saving on $42,225,000 of debt would be around $580,000 a year, equivalent to about 55 cents a share on the 1,053,770 shares of Jersey Central common stock. Jersey Central's own charges, including the year's proportion of debt discount, were earned nearly twice over in 1936. The coverage would be materially increased by debt refunding.

Jersey Central has three series of preferred stock outstanding, aggregating about $22,000,000. The 7 and 6 per cent preferred are redeemable at 110 and the 5½ per cent stock at 107½. If the Jersey Central is merged with Public Service these stocks will have to be paid off. If Jersey Central is allowed to stand as a separate unit in the Public Service system, the new sponsorship, plus the debt interest savings, would tend to strengthen the position of the preferred stocks.

Current Earnings

As indicated in the table on page 615, current increases in utility earnings are beginning to whittle down the unfavorable comparisons with the previous year, while a few figures are also beginning to appear in the "increase" column. Still further improvement will probably be shown a month from now when March quarter figures are included in more returns.

Dow-Jones estimates that American Water Works earned 25 cents on the common stock in the first quarter compared with 6 cents a year ago, but second quarter figures will be affected by the bituminous coal shutdown. Earnings of Brooklyn Union Gas are estimated at 75 cents for the first quarter, compared with 30 cents last year.

Public Service Corporation of New Jersey in the month of March showed net income about 28 per cent larger than a year ago, and Chairman McCarter is optimistic regarding the outlook. Commonwealth & Southern in February showed a gain of about 57 per cent over the same month last year. Detroit Edison has not released figures for current months, but these must be making a very satisfactory showing, for net income in the twelve months ended March 31st gained 10 per cent over last year while previously decreases were reported. Other systems which are included in our table as reporting increases in latest published figures are Commonwealth Edison, Engineers Public Service, Middle West Corporation, Pacific Lighting, and Greyhound Corporation.

United Light & Power made a poorer showing for the calendar year 1938 than previously, but this was probably due to larger appropriations for depreciation and maintenance, these charges totaling nearly $800,000 more than in the previous year.

Corporate News

President Walter S. Gifford of American Telephone & Telegraph Company reported to stockholders at the recent annual meeting that share earnings would be $2 to $3 higher if taxes were relatively the same as in 1935, and indications are that a still further rise in taxes of some $9,000,000 will occur in 1939.

A proposed recapitalization plan, involving an exchange of Class A and Class B stock for new common stock, was expected to be presented to stockholders at a meeting of the Southern Natural Gas Company on May 3rd in Dover, Del. The company announced that, under the plan, the authorized capital stock, which consists of 555,000

shares of Class A and 275,000 shares of Class B stock, will be changed to 800,000 shares of common stock. Class A stock is to be changed, share-for-share, into a like number of shares of new common stock, and Class B shares are to be changed into 137,469½ shares of new common stock, or at the rate of one-half share of new common stock for each share of Class B stock. The balance of the new common stock will remain unissued. While the SEC regarded the plan as "unduly generous to Class B stockholders at the expense of Class A stockholders," approval by stockholders seems indicated, since Federal Water Service Corporation holds about 58 per cent of the Class A stock and is committed to vote in favor of the plan. While Federal will hold only 48 per cent of the new common, this is probably sufficient to continue it in control of the company.

Central and South West Utilities Company, largest unit in the Middle West Corporation's system, is preparing recapitalization plans to eliminate dividend arrears and simplify the corporate structure, according to President Belden's report to stockholders.

The United States Circuit Court of Appeals has vacated an order of the SEC exempting International Paper & Power Company from regulations affecting holding companies and has ordered the case returned to the commission for a rehearing. The petition was brought by a stockholder. It is difficult to see just what tangible results the decision can have, for the commission long ago (acting in conformity with the exemption granted the company) approved a reorganization plan which has now been in effect over eighteen months. The court decision apparently means that the SEC had no original jurisdiction over the plan.

United Corporation, under a plan approved by the SEC, has invested about $3,000,000 of its $8,000,000 available cash in purchases of duPont, American Can, General Motors, and similar high-grade equities. The first purchases, aggregating about $1,000,000, were made soon after SEC approval was obtained March 15th, and another $2,000,000 was invested during the later decline in the market which resulted from the war scare. It seems probable that the remaining $5,000,000 will be expended over the next two or three months. Upon completion of the portfolio diversification program, it is believed the corporation will tackle the problem of reducing its percentage control in the various utility companies through exchange or sale in the open market. For the quarter ended March 31st the company reported net income of $2,056,518 compared with $2,133,331 last year; earnings were sufficient to cover the preferred dividend with one cent left for the common stock.

Queens Borough Gas & Electric Company has decided to reduce electric rates about 15 per cent, granting refunds for service since January 1st, the estimated effect on revenues being about $525,000 a year. The company had formerly been contesting the commission's rate order in the courts, but, despite the low return from the old rates, has decided to eliminate the cost of litigation and give the new rates a fair trial.

Cities Service Company, despite adverse conditions in 1938, greatly improved its balance sheet position. Cash was increased by $19,482,000 to $54,560,618. Through open market purchases and otherwise, the company and its subsidiaries effected a net reduction of $21,000,000 par or stated value of preferred stocks in the hands of the public and at the same time expended $22,000,000 on property construction and acquisitions. In the eight years to December 31, 1938, consolidated funded debt, notes payable, and preferred stock outstanding with the public have been reduced by $143,000,000 face amount or stated value, while gross expenditures for construction amounted to $210,000,000 in the same period.

INTERIM EARNINGS STATEMENTS

	No. of Months Included	End of Period	System Earnings per Share (a) Last Period	Previous Period	Per Cent Increase	Per Cent Decrease
Electric and Gas						
American Gas & Electric	12	Jan. 31(b)	$2.26	$2.53	..	11%
American Power & Light (Pfd.)	12	Nov. 30	5.51	6.36	..	13
American Water Works	12	Dec. 31	.38	1.14	..	67
Boston Edison	12	Dec. 31	8.38	8.72	..	4
Columbia Gas & Electric	12	Dec. 31	.31	.57	..	45
Commonwealth Edison	12	Dec. 31	2.37	2.08	14%	..
Commonwealth & Southern (Pfd.)	12	Feb. 28(b)	8.53	9.38	..	9
Consolidated Edison, N. Y.	12	Dec. 31	2.09	2.17	..	4
Consolidated Gas of Baltimore	12	Feb. 28	4.13	4.56	..	10
Detroit Edison	12	Mar. 31	7.21	6.57	10	..
Electric Power & Lt. (1st Pfd.)	12	Dec. 31	6.08	12.64	..	52
Engineers Public Service	12	Feb. 28	1.17(f)	.80(f)	46	..
Inter. Hydro-Electric (Pfd.)	12	Sept. 30	3.62	18.46	..	82
Long Island Lighting (Pfd.)	12	Dec. 31	4.70	4.82	..	3
Middle West Corp.	9	Sept. 30	.58	.40	45	..
National Power & Light	12	Nov. 30	1.27	1.32	..	4
Niagara Hudson Power	12	Dec. 31	.50	.84	..	41
North American Co.	12	Dec. 31	1.55	1.95	..	21
Pacific Gas & Electric	12	Dec. 31	2.48	2.71	..	8
Public Service Corp. of N. J.	12	Mar. 31(b)	2.55	2.48	3	..
Southern California Edison	12	Dec. 31	2.13	2.21	..	4
Standard Gas & Elec. (Pr. Pfd.)	12	Dec. 31	2.95	9.27	..	68
United Gas Improvement	12	Dec. 31	.99	1.09	..	9
United Light & Power (Pfd.)	12	Dec. 31	5.16	8.64	..	40
Gas Companies						
American Light & Traction	12	Dec. 31	1.47	1.75	..	16
Brooklyn Union Gas	12	Dec. 31	2.25	2.57	..	12
Lone Star Gas	12	Dec. 31	.88	1.14	..	23
Pacific Lighting	12	Mar. 31	4.79	3.32	44	..
Peoples Gas Light & Coke	12	Dec. 31	2.48(e)	3.65	..	32
United Gas Corp. (1st Pfd.)	12	Jan. 31	12.06	24.00	..	49
Telephone and Telegraph						
American Tel. & Tel.	12	Feb. 28	8.53	9.31	..	8
General Telephone (d)	12	Dec. 31	1.86	2.00	..	7
Western Union Telegraph	12	Dec. 31	D1.57	3.18	..	..
Traction Companies						
Greyhound Corp.	12	Dec. 31	2.05	1.85	10	..
Twin City Rapid Transit	12	Dec. 31	D1.15	1.14	..	..
Systems outside United States						
American & Foreign Pwr. (Pfd.)	12	Sept. 30	6.76	7.69	..	12
International Tel. & Tel. (c)	12	Dec. 31	1.10	1.60	..	31

D—Deficit.

(a) On common stock, unless otherwise indicated following name of company; in some cases Federal surtax not deducted.

(b) Data also available for month indicated.

(c) Excludes Spanish subsidiaries and Postal Tel. & Tel. Co.

(d) Including the earnings (exclusive of fixed charges of parent company) of Indiana Central Telephone Company and subsidiaries for periods prior to August 31, 1938, date of completion of reorganization of Indiana Central Telephone Company and transfer of assets to General Telephone Tri Corporation.

(e) Before reservation for rate litigation, $5.74.

(f) Excluding loss of Puget Sound Power & Light Company.

What Others Think

National Congress Considers Multipurpose Dams

THE building of multipurpose projects was one of the subjects of utility interest which received considerable attention at the recent Rivers and Harbors Congress assembled at the Mayflower Hotel in Washington, D. C., on March 23rd. John C. Page, commissioner of the Bureau of Reclamation, led off the discussion with a paper entitled "The Multipurpose Project." Page conceded that there were difficulties to be overcome in the building and operation of dams dedicated to uses which can be truly accomplished only by contrary methods of technique, but he stated his belief that the modern engineer has used his increasing technical skill in perfecting the multipurpose project in response to a general demand by the public that maximum benefits be made to flow from public expenditures for such projects. He said that such was "an expression in engineering terms of a new social consciousness."

He observed further that this has always been true to some extent, even with the old single-purpose standards. He stated:

> Almost every reservoir designed to reduce floods would serve, ill or well, some other purpose. The water held back would have to be released at times of lower flow. This definitely would affect other activities on the stream below.
>
> It would be impossible to design a dam that would concentrate the fall of a stream and so make water power available, but would serve no other purpose. Every dam creates a reservoir, large or small, and every reservoir delays the flow of water at high stages.
>
> The multiple-purpose project, which now is the subject of much discussion, is the result of recognition by forward-looking engineers that the single-purpose project, in many instances, needs little expansion when in the planning stage to serve as well important related functions. Through thus increasing the efficiency of the project, 50 cents has been made to do the work of a dollar in some instances in the provision of storage for irrigation, for example, and the other 50 cents has, at the same time, served to lower the cost of providing protection from floods or of the generation of electric energy.

Mr. Page defined the multipurpose project as any dam, series of dams, or dams working in combination with other facilities which serve more than one function in the field of water utilization and control. Navigation, power production, flood control, irrigation, pollution abatement, recreation improvement, and water supply were among the functions included. As an example of such versatile utility he cited the Central valley project in California, describing it as follows:

> There is one great project now under construction, for example, that will serve the following diverse purposes: improvement of navigation on two important rivers; reduction of flood damages to highly developed lands along these rivers; irrigation of about 1,000,000 acres of equally rich lands now inadequately supplied with water; the production of low-cost power for a rapidly growing market; and the regulation of the fluctuating flow of the river for domestic water supply, for industrial water supply, and for the protection of 400,000 acres of fertile delta lands now threatened with ruin by the infiltration of salt water.

As a champion of the multipurpose dam, Mr. Page defended the operation of the Marshall Ford dam in the Lower Colorado river in Texas. This dam, which is supposed to afford flood protection, as well as produce power, had been under local attack in Texas because it was felt that it had contributed, or at least had not sufficiently hindered flood conditions on the Lower Colorado, river last July. He cited other examples

to the effect that multipurpose dams were successfully performing more than one function, including the Tygart river dam, a tributary of the Monongahela river in West Virginia; the Pymatuning dam on the Colorado river with its newly created Lake Mead; and units of the Tennessee Valley Authority.

He cited arguments of various engineering authorities, including Major General Julian L. Schley, chief of the Army Engineers, and Abel Wolman, chairman of the Water Resources Committee. He concluded:

> Conservation and control of water for other purposes very largely has been a public endeavor for many years. It is generally accepted today that flood control, irrigation, domestic water supply, navigation, recreation, wild life protection, and, for the most part, sanitation, are fields for community action, either local, state, or national. Since this is so, I do not see how the public can be denied the right to develop all of the possibilities which are created by the public's work.
>
> It is the duty and the task of the designer, as stated in "Energy Resources and National Policy," and of those who guide the application of public policy to develop all of the potential benefits of great river systems in such manner that their sum shall be a maximum. Each should be and can be developed in harmony with the others; each should contribute its share to obtain a total benefit much larger than would be possible by separate exploitation, and that at lower total cost.

U. S. Senator Carl Hayden of Arizona conceded the validity of multipurpose projects as a feasible objective of engineering, but he regretted confusion which has arisen in the failure to coördinate the administration of such projects. He said on this point:

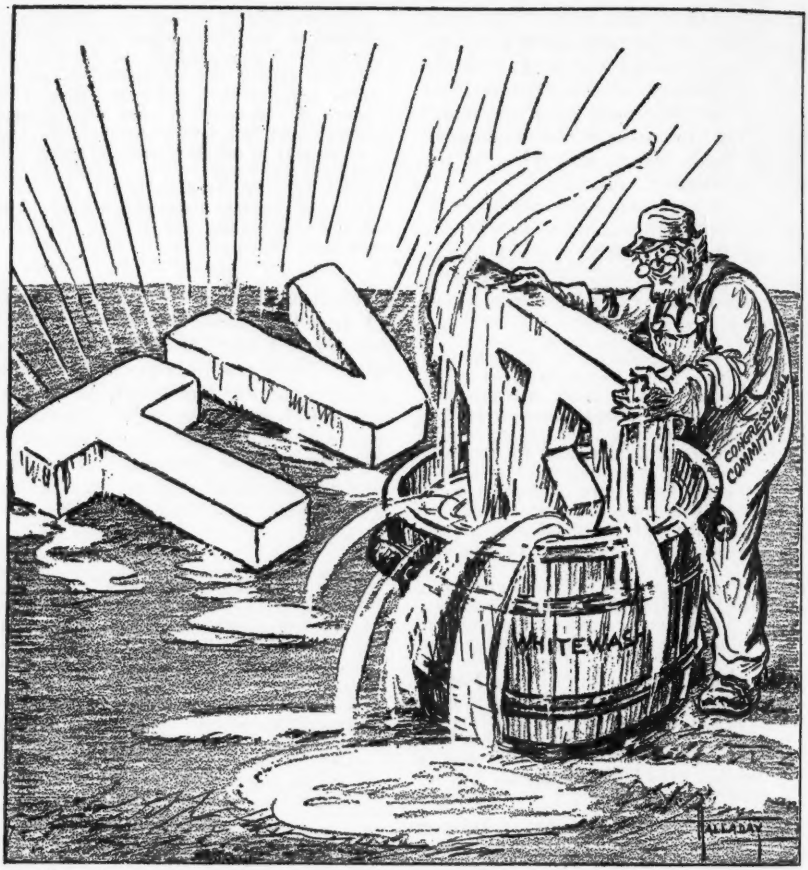
> The relationship of reclamation to these flood control proposals under investigation by the Corps of Engineers is important in the light of the Federal policy requiring repayment of the cost of irrigation facilities. Yet, there is no adequate machinery set up for coördinating the plans under which it may be determined what part of the anticipated costs may be properly chargeable to flood control and how much may be charged to prospective water users under irrigation ditches.
>
> Each of the Departments of War, Interior, and Agriculture has an ample and constantly increasing amount of work to do within the field of its own activities as now defined by law. But on any great western watershed there are bound to occur instances of overlapping and confusion. Common sense requires there must be some place where all concerned in what might otherwise develop into serious conflicts of jurisdiction may be calmly considered and determined in an orderly way by some authority which includes representatives of the interested departments. Otherwise, there will be misdirected efforts and serious losses in efficacy.

Senator Hayden reminded his audience that planning is not new in this country and that the utilization of the inland water system is as old as the nation, but that we lack a definite permanent statutory authority for planning a wiser and better use of natural resources. To that end the Senator said he had introduced a measure to set up a permanent national resources board. He concluded:

> The major objective of my bill—in fact the sole objective—is to bring about orderly, thoroughly considered planning for Federal undertakings affecting the national resources. Water has been stressed by reason of the fact that its control and utilization are primary considerations that affect the present well-being and the future of millions of people and of billions of dollars in property values. Naturally, when we consider water, its inherent relationship to the land is obvious and their conservation and utilization must go hand in hand.

Another speaker before the Rivers and Harbors Congress was Harcourt Morgan, present chairman of the TVA. Morgan's address avoided the somewhat controversial issues in which TVA has become involved recently. Instead he traced in an interesting fashion the past history of inland water development in the United States from the colonial period. Coming down to date, he commended the multi-use features of the TVA program in part as follows:

> This is already being demonstrated in the case of the three completed dams—Norris, Wheeler, and Wilson. By allocating the costs of these dams as an operating unit to the three functions which they serve, the government has secured a navigable stretch of the river for less than 60 per cent of what this would have cost as a separate project.



Providence Journal

SPRING CLEANING

Similarly, flood storage has been secured at a cost of $7.50 per acre-foot, and power has been developed for $141 per kilowatt, which, I am told, compares favorably with the cost of equivalent hydroelectric generating capacity elsewhere.

It must be apparent that the Tennessee Valley Authority is built soundly upon ideas that have grown up with our country. These ideas have been enlarged as new possibilities were opened through technical advancement in engineering and the allied sciences. . . . In the Tennessee valley the development of the Tennessee river is only one phase in the unified control, conservation, and use of water resources. . . .

Our traditional approach to water control problems has been confined to the river channels themselves. The Congress has authorized and directed engineering work to control waters after they have reached the stream channels. It has done this to promote the public welfare. Recently the Congress discovered that this has been too narrow a conception of water control and that, if the public welfare is best to be served, control of water must be related to an entire watershed as distinguished from the river channel. This means that water control must start where the rain falls—on the land itself.

A SLIGHTLY critical note about multi-purpose project development was struck in an address by U. S. Repre-

sentative A. C. Schiffler of West Virginia. The Congressman recalled his own residence on the banks of the Ohio where he has observed commendable industrial development going along hand in hand with physical improvement in the watershed.

Referring to the recent government flood control program, however, Representative Schiffler stated:

> The flood control program in some instances has met with strong resistance and assertions are made, which I am unable to confirm or refute, that flood control, when linked with electric power production, destroys its primary purpose; and, as a basis for such controversy, it has been stated that a large volume of water is necessary to be available for electric power generation, which creates full reservoirs and eliminates the reserve space that is designed to be available for water control in times of excessive rains and thaws. If the project sponsored for flood control is also utilized for electric power generation and such statements are correct, it does seem logical that such is an inconsistency and that greater progress will be made in planning flood control projects by eliminating electric power-generating possibilities.
>
> Again quite widespread feeling has grown up on the part of privately owned enterprises involving both owners, who comprise a large body of Americans, and also a large body of employed Americans, in opposition of the efforts at the expense of government, and without resort to the ordinary requirements of obtaining certificates of convenience and planning in operation of such competitive projects at the expense of the government. Privately owned enterprises are bound to offer strong resistance to the activities of government that draw upon such industry, at least in part, for taxes which are used to create competitive publicly owned enterprises. This opposition is undoubtedly meritorious. It is very much like lending your gun to your worst enemy who uses it to kill you with.

Representative Schiffler congratulated Congress on its achievements in the past and ventured the suggestion that it would continue to function as a valuable guiding spirit in the future development of the resources of the nation.

The Commerce Department Meets With the Electrical Manufacturers

REPRESENTATIVES of the American electrical manufacturing industry held a 2-day conference in Washington on March 30th with officials of the U. S. Department of Commerce to exchange trade views and become better acquainted with the foreign and domestic trade facilities available to them through government channels.

The meeting was sponsored by the National Electrical Manufacturers Association and the conferences were held in the Department of Commerce auditorium, featuring discussions by government officials of research and trade promotion for the electrical industry.

Among the addresses given during the conference was a speech by Dr. Willard L. Thorp, special economic adviser to Secretary of Commerce Harry L. Hopkins, who predicted "closer working coöperation" between the Temporary National Economic Committee and the business community in solving the nation's economic problems. The TNEC activities, Dr. Thorp said, are directed toward seeking the causes and effects of our rapidly changing and highly complex economic order with the view of pointing the way to correctives by both business and government.

In addition to new tabulations of census, Dr. Thorp pointed out that important studies are being made which will soon cast new light on the workings of American trade associations. A report on trade associations, he said, is now being prepared by the Department of Commerce on the scope, characteristics, and activities of more than a thousand of these organizations.

ANOTHER speaker was H. C. MacLean, chief, trade agreements unit, at the Department of Commerce, who observed the beneficial results which the

electrical manufacturing industry has enjoyed and will continue to enjoy as a result of the reciprocal trade agreement policy of the present administration. He said:

> Between 1933 and 1937, United States exports of electrical machinery and apparatus rose from $44,000,000 to $113,000,000, and, despite a decline in 1938, were still in excess of $100,000,000 in that year. Even for such a very great industry as yours, $100,000,000 represents a volume of sales that I feel sure you wouldn't like to lose and would like to increase. This foreign business didn't just fall into your laps without effort. Your companies had to go out and get it in the face of competition, and they wouldn't have done so if they had not thought it worth while. . . .
>
> In the case of the electrical industry, the specific concessions that have been secured are too numerous to mention in detail, but a few examples will illustrate their character. For radio apparatus, a particularly important electrical item, since 1938 exports were valued at over $23,000,000, more favorable duty or quota treatment was obtained in 9 agreements, and existing rates of duty were bound against increase in 4 more. For electric household refrigerators, which were exported to the amount of nearly $11,000,000 in 1938, more favorable duty or quota treatment was obtained in 4 agreements, and existing rates of duty were bound against increase in 7 more. For motors, starters, and controllers, exports of which reached nearly $9,000,000 in 1938, duty reductions were obtained in 3 agreements, and existing rates were bound in 4 more. Where duties have been bound rather than reduced, it usually means either that the rate was already favorable or that there was reason to fear that an increase in duty might be made. As an indication of the extent of the concessions obtained, the United Kingdom agreement reduced the rate on electrical refrigerators from 20 per cent to 15 per cent, or by one-fourth; the Swiss agreement increased the import quota allotted to the United States for radio receiving apparatus by 60 per cent; and the French agreement reduced the duty on certain sizes of electric motors by amounts ranging from 19 per cent to 38 per cent. Certainly, all these concessions have made it possible for American manufacturers to increase their sales.

The manufacturers' representatives also heard Conway P. Coe, Commissioner of Patents, who spoke on the importance of the patent system to the electrical industry. He observed that of the 36,000 patents issued during the last fiscal year, more than 6,000 were for electrical inventions, in addition to an important part played by electricity in many other inventions represented by these 36,000 patents. The speaker continued:

> The protection which the patent system has afforded electrical inventors, along with others, has yielded benefits not only to them but to the whole human race. In particular, these patents have reared whole industries that, in supplying necessities and luxuries, have at the same time given work and incomes to millions. That is but another way of saying that in the very act of producing goods these industries have provided their workers with the means of purchasing them.

MR. Coe conceded that the human race could get along without a patent system as it has in the past and even make substantial progress, but he feared that any wholesale destruction of our patent system would threaten the existence of our present order of civilization. It is for us, he said, to see to it that the patent system is kept up to a relative degree of perfection through changes which may be necessary from time to time in the public interest. He denied that the patent system fostered antisocial monopoly, but made several suggestions about specific improvements of the system as now constituted.

Another speaker at the conference was Richard C. Patterson, Assistant Secretary of Commerce, who declared that the nation can expect a considerable improvement in business and employment conditions in the United States during 1939, and urged all business men, large and small, to use the Department of Commerce as their agency for promoting trade progress and recovery. On business prospects for 1939, Mr. Patterson said:

> I don't think I am speaking in terms of the Pollyanna when I say that the immediate outlook is favorable. We take the view that business this year will show considerable improvement over the 1938 results. Six months of recovery had by the end of last year restored a measure of balance to our economy and placed business activity generally in a position considerably above the 1938 low, although some distance short of of the 1937 level.

THE conference heard Addams S. McAllister, assistant director in charge of commercial standardization, National Bureau of Standards, speak on the activities of that agency with respect to electrical manufacturing. He referred to the division of simplified practice as a "clearing house or centralizing agency through which manufacturer, distributor, and consumer groups coöperate in furthering a nation-wide program for the elimination of the excessive and needless variety of sizes, types, and dimensions of manufactured products."

John Howard Payne, chief of the electrical division of the Bureau of Foreign and Domestic Commerce, and head of the conference arrangements, discussed the work of his division, which has built up during recent years extensive information services, the majority of which pertain to foreign trade.

Mr. Payne, in his discussion, referred to the various publications which the government makes available covering foreign markets for electrical products and business opportunities and the facilities of his bureau for informal coöperation with electrical manufacturers and exporters.

Power Transmission during National Emergency

SPEAKING at the Midwest Power Conference in Chicago on April 6, 1939, M. W. Smith, manager of engineering at the Westinghouse Electric & Manufacturing Company, presented various phases of power transmission during national emergency to engineers and educators from all parts of the country. Mr. Smith stated:

> Today our newspapers carry headlines of wars and rumors of wars. We read that Russia has unknown thousands of planes for war purposes; that Germany has from 10,000 to 16,000 fighting planes at present and is rapidly increasing her production capacity from 1,000 to 1,600 per month. Similar statements could be made about all the principal European nations. In the United States, Congress has voted some of the largest peace-time military appropriations in the history of our country. These vast programs bring us face to face with more basic and far-reaching preparations in our manufacturing facilities against the much discussed "M Day," when we may be faced with another war. Defensive equipment is now so well developed that the nation that has natural resources and facilities to keep front lines supplied with war materials is most likely to eventually win. The continuous production of war materials is very much dependent on the availability of *power*.
>
> As a result of the administration's decision to have an adequate power reserve for war-time requirements, the utilities have been requested to provide a surplus of generating equipment, and strong ties set up between systems necessary to keep industrial and munition plants in operation in the event that local plants are badly damaged by air raids. This program is naturally associated with the problem of finding an outlet for the recent government-built water-power plants, and we hear discussions of long-distance transmission lines ranging from 500 to 2,000 miles as having the same economic justification as a battleship.

Mr. Smith mentioned the fact that, taking the United States as a whole, the average transmission distance is less than 20 miles. He continued:

> Due to government development of remote water-power sites, there has been a revival of interest in the last ten years in long-distance transmission even though the economic situation has not changed in the least, and schemes which hitherto were discarded for economic reasons must now be reconsidered. Direct current transmission in its present stage of technical evolution is a long way from being an economically justifiable tool, and the present inverting equipment used to invert direct to alternating current is not yet an active competitor of alternating current in any situation where transmission can function as an economically justifiable venture. This dismisses direct current as a possible method of handling power during national emergency.

MR. Smith added that alternate current transmission was also impracticable because of the expensive type of equipment required. He believed that high-voltage transmission was still the best expedient.

The Oregonian

A START TOWARD A HARNESS

Under this method power can be transmitted straightaway over one line for a distance of 100 miles with a loss of only about 7 per cent.

Mr. Smith said that by using the excess over and above reserve requirements for reliable service, the present power exchange capacity of lines could be increased from 50 to 200 per cent depending upon the particular system, and that this increase would be adequate, especially with reënforcement of local generation.

Much of the effort towards adequate war-time power supply, he said, was probably being directed independently and that plant and coördinated action on the part of engineers, together with assistance from the electrical manufacturers, would be able to handle the situation in a manner most satisfactory from all points of view.

POWER TRANSMISSION DURING NATIONAL EMERGENCY. Address by M. W. Smith before Midwest Power Conference. Chicago, Ill. April 6, 1939.

Safeguarding Electrical Utility Earnings

IN these days when electric rate reductions have come to be so widespread and commonplace, it is not often that attention is given to the possibility that the electrical industry may some day reach the end of its rate-cutting rope, in view of increasing operating costs and taxes. When that happens, the descending trend in electric rates will have to come to an end, like all other good things —if the industry is to be allowed to safeguard its financial foundation.

Addressing the Bond Club of Philadelphia, H. P. Liversidge, president of the Philadelphia Electric Company, recently threw some light into this infrequently explored corner of electric utility economics. He said that in order for electric rates to continue their downward trend, increasing volume of consumption would have to continue as well. He added:

> The critical factor in such a program is this question of rates—the prices charged for electric service. Just because we have a past record of numerous voluntary reductions and have successfully met the many demands of regulatory bodies during the past few years, there is no reason whatever to assume that such reductions can continue indefinitely without impairing the financial stability of the industry. The moment return on investment fails to prove attractive, capital goes elsewhere, improvements and extensions lag, maintenance of property is curtailed, and, in consequence, both customer and investor ultimately suffer.
>
> The importance of this task—continuing rate reductions and at the same time safeguarding earnings—becomes evident when it is realized that we are today working on an extremely close margin. This margin could probably be regarded as safe were it not for the fact that sometime in the future —and let us hope it won't be soon—we must face another business depression. Unless we are foresighted, we may enter the next downward cycle in a much less favorable position financially than was the case in 1930. Theoretically, of course, regulation of utility rates is expected to work both ways. Yet I have never been enthusiastic over the prospect of securing increased rates if the need arises when business and employment get to depression levels.

Mr. Liversidge said that it does not always follow that consumption increases automatically when a rate reduction has been made. He pointed out that housewives wash clothes only so often, clean their houses only so often, cook only so much, and refrigerate just so much food. Mr. Liversidge observed that "what has happened is that the cart has been placed before the horse and all too frequently rate reductions have been promulgated on the false assumption that increased use, as well as increased revenue, would automatically result."

He recalled that when his company announced a $1,650,000 annual electric rate reduction in Philadelphia territory, effective March 1, 1939, it took steps to publicize the event by half-page newspaper advertisements and other methods. Yet a canvass ten days later showed that only three out of ten residents had heard of the reduction. He concluded from this that the public generally is not particularly interested, even though it did appreciate the rate cut.

MR. Liversidge conceded that the electric industry, as a whole, is likely to double its residential output during the next twelve or fifteen years; but that in certain areas the saturation point is being approached. And, of course, there is the counterelement of increased operating cost, concerning which the speaker stated:

> Statistics indicate that for the industry as a whole the ratio of operating expenses to revenue is now 60 per cent of what it was some thirty-five years ago. However, the ratio of the sum of taxes, depreciation, and return to operating revenue now averages approximately 65 per cent more than it was then. As an illustration of the cause of such major changes in the nature of utility costs, I might cite the average coal rate. By that I mean the amount of coal that has to be burned to produce a kilowatt hour. It is now approximately 20 per cent of what it was thirty-five years ago. On the other hand, direct taxes in per cent of gross revenue are now four and one-half times the taxes of that earlier period.

In the course of his remarks, Mr. Liversidge revealed that it was not the poorer class of customers who always

use the least amount of electricity. On the contrary, many customers who make the fullest use of their electric service are families of modest income, who do much of their own housework with the aid of electric appliances in the home. Another little known fact is that nearly 50 per cent of domestic consumers do not use enough electricity to give the Philadelphia utility an adequate return under existing rates or the investment required to supply them. Even this percentage, the speaker pointed out, was better than the national average.

In conclusion, he was optimistic about the possibility of the electric power companies improving their financial position, if they are not burdened with oppressive increases in operating costs. Managerial direction is on a higher plane, and technological advances of the past few years have done much to brighten the economic picture of the operating electrical utility industry.

Notes on Recent Publications

ADDRESS by Representative Charles A. Wolverton over the Columbia Broadcasting System. April 6, 1939. Broadcast from Station WJSV, Washington, D. C., at 5 P. M.

This address was a defense of the recent minority report of the Joint Congressional Committee Investigating the TVA.

ADMINISTRATIVE FLEXIBILITY OR INDUSTRIAL PARALYSIS? Address of Jerome Frank before Georgetown Law Alumni Club, Washington, D. C. November 9, 1938.

Although this address was delivered some months ago, and Mr. Frank is already reported to be uncertain about his future as far as his SEC job is concerned, his discussion before this eminent group of Washington lawyers throws much light upon the informal procedure and the coöperative spirit with which the SEC has endeavored to work out its various statutory chores. Few realize the complicated and burdensome nature of these chores which have been heaped upon this young Federal commission in increasing volume. Mr. Frank said the SEC decided the easiest way was the best way—hence, round-the-table conferences with the interests to be regulated, with some resulting displacement of the usual importance of the intermediary corporation lawyer. Justifying SEC policy with respect to the Holding Company Act in letting the various units propose their own plans for conformity, Mr. Frank said:

"Under the Public Utility Holding Company Act, SEC would have been compelled to lay down regulations, calling for simplification and integration of holding company systems by rule instead of by the reasonable, business-like, evolutionary policy in effect now. The commission would have to enact, among other things, rules of intercompany loans, dividend payments, security transactions, sales of assets, proxies, service contracts, sales contracts, construction contracts, standard reports, accounts, and records. Such a blanket enactment would have a deadening effect on an industry which is changing as rapidly as the utility industry. It would ignore the vital fact that in any program of regulation, every item must be coördinated with and fitted to every other item and must be kept in harmony with the shifts and developments in the industry.

"It would result in overlapping and duplication of rules. Moreover, it would offer to industry a diet of regulation which industry would be unable to digest. Business and business men, like any of us, can absorb just so many rules at a time. Administrative agencies are aware of that. Indeed, we realize as well as business that regulation by government, if it is to be successful, must *not* be poured upon business. It must be carefully and slowly and experimentally adapted to business practices until it easily becomes part of them. On that basis, SEC has not only studied carefully before making its rules, but has changed its rules to fit conditions, modifying those rules which encountered unforeseen conditions or which caused unforeseen, unintended, and undesirable consequences."

ICC CONTROL OF ELECTRIC RAILWAYS—A STUDY OF THE ADMINISTRATION OF THE INTERSTATE COMMERCE ACT AND RELATED ACTS AS APPLIED TO STREET, INTERURBAN, AND SUBURBAN ELECTRIC RAILWAYS. By Charles F. Conlon, Jr. 7 *George Washington Law Review* 325. January, 1939.

RADIO CENSORSHIP. By Hubert T. Delaney and Seymour D. Altmark. 1 *National Lawyers Guild Quarterly* 401. December, 1938.

TELEVISION—A NEW MAJOR INDUSTRY? By Peter T. McKinney. *Financial World*. April 5, 1939.

The March of Events

Boulder Rates Face Revision

REVISION of rate and interest charges for Boulder dam power users was to be asked of Congress about May 1st, according to the *Los Angeles Times*. Embodying broad changes in the financial operation of the dam, a new act—entitled the Boulder Canyon Project Adjustment Act—probably would be introduced in the House by Representative Scrugham, Democrat of Nevada, it was disclosed.

The legislation was being studied by Interior Department Solicitor Kurgis and other officials and was to be submitted to Secretary Ickes, it was said.

Proposed major changes in the Boulder dam rates included reduction of the primary power charge of 1.63 mills per kilowatt hour to approximately 1.1 mills and a lowering of the interest charges on the dam's construction cost from 4 per cent to 3 per cent annually. The new act would provide that repayment of a $25,000,000 flood control allocation shall be deferred until the end of the 50-year amortization period in 1987.

Opposition to the rate revision by the upper basin states of Colorado, New Mexico, Utah, and Wyoming was believed to have been eliminated through a proposed arrangement providing for a 9-year program of investigation and construction of irrigation and power projects throughout the four states.

Annual payments of $500,000 would be made to the Treasury from the dam's excess revenues, and set aside in a separate fund for the use of the Colorado basin group. Payments during the first three years, totaling $1,500,000, would be used for a survey by the Bureau of Reclamation of irrigation and power resources of all seven states of the Colorado basin, but revenues from the year of operation ending in 1942 to the year 1950 would be devoted to the needs of the upper basin group alone.

Florida Ship Canal Bill

A BILL to resume construction of the Florida ship canal was reported to the House last month. The Senate Commerce Committee had completed hearings on the measure, but had not acted.

The report followed a favorable vote in executive session of the Rivers and Harbors Committee. The tally on the controversial project was said to have been 6 to 10. It was said that three of those voting to report reserved the right to oppose the bill on the House floor.

President Roosevelt started the project in 1935 as a WPA enterprise. After $5,401,000 had been spent, Congress prohibited further WPA outlays. The present bill is based on a report of the former Chief of Army Engineers, Major General Edward M. Markham, that the sea-level waterway could be built for $200,000,000 instead of the $263,000,000 estimated by a board of Army Engineers, who held that this latter cost made the project unsound.

The bill provides that on the canal's completion the President shall determine whether tolls shall be charged. Mr. Roosevelt, in asking for action, estimated that tolls would return the project's cost without interest.

Power Project Approved

THE Army Engineers on April 22nd recommended to Congress the construction of a $28,000,000 reservoir and power plant on the Savannah river about 20 miles above Augusta, Georgia. Major General Julian L. Schley, chief of the Army Engineers, approved the project in a report forwarded to Congress by Secretary of War Woodring. The project is known as the Clarks Hill reservoir.

The reservoir would regulate the Savannah river flow and develop hydroelectric power.

TVA to Increase Tax Payments

THE Tennessee Valley Authority recently announced it would increase tax payments to Tennessee and Alabama to compensate the states for loss of revenue through sale of privately owned electric utilities. Also, the board of directors decided to ask Congress to broaden its scope of payments to include Kentucky, North Carolina, Mississippi, and Georgia.

Under the TVA Act of 1933, the authority is now paying Tennessee and Alabama 5 per cent of its gross electric revenues, distributed on the basis of the source of electric generation. This 5 per cent payment would be increased, TVA said, "to some higher figure."

The increased payment by TVA would become effective after the authority and munici-

palities and electric coöperatives have completed their pending purchase of the properties of Commonwealth & Southern Corporation, in Tennessee, Alabama, and Mississippi. The announcement said:

"In order to arrive at a fair adjustment, the board plans a series of public conferences with representatives of state and local agencies. These conferences are to be scheduled immediately.

"The method of distributing TVA payments within the states will be considered, as well as the amount of such payments. The subject of tax equivalent payments by municipal power systems will be explored and also the special county tax situations created by the prospective transfer of electric properties.

"The basic consideration in these conferences should be an evaluation of the compensatory benefits to the region of the comprehensive TVA program of flood control, navigation, soil conservation, and related activities."

Government Finances Parker Dam

To meet a critical power shortage in central Arizona, construction of a hydroelectric power plant at Parker dam was to start soon, according to a recent announcement made by F. E. Weymouth, general manager of the Metropolitan Water District.

Acting on authority granted by the board of directors of the water district, Weymouth signed a contract with the Federal government under which the government would supply all necessary funds to build a power plant at Parker dam, on the Colorado river, and a transmission line at Phoenix, Ariz., to supply electric power to the Central Arizona Light & Power Company and the Salt River Valley Water Users' Association.

The proposed plan was expected to result in a credit of approximately $6,800,000 to the Metropolitan Water District, and would set forward by a number of years the construction of the power plant. The foundations for the plant, which eventually will supply power for pumping purposes on the 392-mile Metropolitan Aqueduct, were built at the same time that Parker dam was constructed to divert Colorado river water into the aqueduct.

Parker dam was constructed with funds supplied by the Metropolitan Water District under a coöperative agreement with the Federal government by which half of the power privileges belong to the water district and half to the government.

Under the new contract which was recently made, the government will build and, for a number of years, will operate both its own and the water district's power generating units, and will credit the district with its share of the revenue received from the sale of power. At the present time the Metropolitan Water District is buying power from the government at Boulder dam to operate its five aqueduct pumping plants, and this source, Weymouth pointed out, will supply sufficient power for pumping purposes for a number of years.

Amlie Nomination Withdrawn

President Roosevelt on April 17th formally withdrew his nomination of Thomas A. Amlie for the Interstate Commerce Commission. At the same time he made public a letter to Amlie charging that factors impelling the withdrawal "ill serve the democratic form of government." The nomination was withdrawn in a formal communication to the Senate. The President wrote:

"I deeply regret that a certain type of opposition should deprive the Interstate Commerce Commission of one as able and as wholeheartedly devoted to public service as you are."

Amlie requested the withdrawal in a letter to the President on April 7th, after it became obvious that his opponents in the Senate made his confirmation impossible.

California

Rate Slashes Forecast

Early rate reductions of "equitable adjustments" affecting five major California utilities were forecast by President Ray C. Wakefield of the state railroad commission last month.

His announcement came as commission surveys of the Pacific Telephone & Telegraph Company, the Pacific Gas & Electric Company, the Southern California Telephone Company, the Southern California Gas Company, and the Southern California Edison Company neared completion. The surveys were undertaken some months ago pursuant to a state commission policy of continuous investigation of utility operations.

The Pacific Telephone & Telegraph survey was concentrated on rates in the San Francisco-East Bay exchanges; the Pacific Gas & Electric survey concerned electric rates only.

Wakefield described the Southern California Telephone Company investigation as involving "perhaps the most complicated telephone problem in the United States," and declared the commission was primarily interested in adjustment of rates in the Los Angeles metropolitan area.

He asserted state commission investigations have effected savings of $13,000,000 for utility customers throughout the state in the last two years.

Colorado

Municipal Ownership Petition Barred

PETITIONS bearing nearly 8,000 signatures for a charter amendment to provide for municipal ownership and operation of gas and electric utilities were held to have been withdrawn by their sponsors in a ruling by the Denver city election commission last month. The ruling barred the petitions from the ballot for the municipal election May 16th.

The commission did not rule on whether the petitions had been properly filed or on the sufficiency of names. The decision was that three persons whose names appeared on the petitions as sponsors had voluntarily relinquished any connection with or responsibility for the petitioners.

The former sponsors presented signed letters to the commission before the hearing refusing to permit use of their names in any way in connection with the movement and declaring they had withdrawn as sponsors some time before the petitions were filed.

Thomas Annear, former state auditor, and Paul V. Muckle, Denver business man, whose names appeared on the petitions as candidates for the proposed city power commission, which would be given power to acquire and operate existing gas and electric utilities for the city, also renounced any connection with the movement.

This left only Mrs. Thay S. Alford, secretary of the Denver Public Ownership League, who originally filed the petitions, to defend them. Mrs. Alford said all the persons whose names appeared on the petitions had been willing participants in the movement and withdrew merely because of a difference of opinion on procedure. She contended the withdrawals did not invalidate the signatures on the petitions and that it was mandatory for the commission to place the amendment on the ballot.

Senators Pass Bill

A BILL amending the 1937 Public Works Act and altering the procedure for the issuance of revenue bonds for municipally owned utilities was passed on second reading April 19th by the state senate.

Senator Robert G. Bosworth of Denver, sponsor of the bill, said under the existing law a majority of the qualified and assessed electors of a municipality must approve the issuance of revenue bonds for municipally owned public works. His amendment would require only a majority of the votes cast and limit the voters to owners of real property.

Connecticut

Congress Pigeonholes Project

THE House Rivers and Harbors Committee recently pigeonholed indefinitely Army Engineer recommendations that the Federal government undertake a navigation improvement program in the Connecticut river above Hartford, including a Federal power dam at Enfield and a navigation dam near Hartford.

The committee shelved the project by ordering further hearings and by declining to include it in the 1939 omnibus rivers and harbors bill. The committee voted not to include the upper river project on motion of Representative Dondero, Republican of Michigan. Dondero moved the project be indefinitely deferred pending further testimony by Army Engineers. The Michigan Congressman said later he viewed approval of his motion as definitely sidetracking the project until next session. He argued that it was 60 per cent power, and only 40 per cent navigation, and that benefit estimates by Army Engineers varied widely from those by private interests, and said he wanted a satisfactory explanation by Army Engineer spokesmen.

Georgia

Lower Power Rate Urged

A CONFERENCE between officials of the Georgia Power Company and the state public service commission to effect a downward revision of the company's rates was requested last month by W. R. McDonald, commission chairman, in a letter to Preston S. Arkwright, power company president.

Citing three specific objections to existing schedules, the letter stated that the residential inducement rate apparently was helping only

60 per cent of residential customers and asked a change so that it would apply to all consumers.

Consideration also was asked for revision of the general commercial rate, especially as it affects smaller users, on the ground that the minimum requirements now in force "produce inequalities" and make it impossible to reduce the unit cost by using more power.

The third modification asked was in connection with the commercial rate applicable to cooking and heating "which fails to provide a level that will permit of its wide use for this purpose."

Illinois

Slattery Named Senator

JAMES M. Slattery, close adviser of Governor Henry Horner and former chairman of the state commerce commission, accepted his appointment to the United States Senate on April 14th with a pledge of support for "the great humanitarian principles and objectives of the Democratic national administration."

The governor selected the new Senator to fill the seat vacated by the recent death of Senator James Hamilton Lewis. He will hold the post until November, 1940, when a Senator to serve out the balance of the Lewis term, extending to 1942, will be chosen in the general election. Slattery said it would be his aim to merit the trust placed in him by the governor by striving to represent the people in the same sincere and conscientious manner as that which marked the service of his predecessor.

During his three years as head of the state commission reductions in utility rates representing a saving of $23,000,000 a year to Illinois consumers have been effected.

Indiana

Utility Must Pay Levies

THE Richmond municipal light and power plant must pay $33,543.50 in delinquent state and county taxes, accumulated since 1934, in addition to interest and penalty, according to a ruling made last month by Philip Zoercher, chairman of the state board of tax commissioners, to County Treasurer Earl Freeman.

Richmond and a number of other municipal utilities have not paid taxes since protesting the levy. The last general assembly made municipal utilities tax exempt.

Zoercher said "all taxes levied on that part of a municipally owned utility used for commercial purposes, the valuation of which was fixed by this board, should be collected—taxes and penalty." Taxes levied but which were not collected, according to Zoercher, remain a lien on the property of the utility, the same as other property. No valuation will be fixed for 1939 as a result of the act passed by the last legislature.

A court test loomed in Crawfordsville on April 14th when that city sued in circuit court for an injunction to prevent Grady Chadwick, Montgomery county treasurer, from collecting county taxes on its light plant. The county contended the city owes $2,835 on the utility, assessed at more than $500,000.

Mayor W. Vincent Youkey, Crown Point, executive secretary of the Indiana Municipal League, issued a statement in Indianapolis saying the case concerned all 304 municipal utilities in the state. He said the Montgomery county treasurer was the only one who had tried to collect 1938 taxes on city property and that the suit was the first of its kind to be filed.

Michigan

Seeks Ruling on Legality

STATE Attorney General Thomas Read was asked last month to rule on the legality of orders issued by the state public utilities commission since February 15th, when the law abolishing the commission was signed. The opinion was requested by members of the new state public service commission which took over the commission offices on April 12th after the supreme court ruled that the state legislature had power to change the commission during its legislative session.

Gas Rate Quiz Delayed

POSTPONEMENT of the opening of the state inquiry into gas rates charged in Detroit was announced last month by Gilbert T. Shilson, member of the new state commission.

The inquiry, requested by Prosecuting Attorney Duncan C. McCrea, scheduled to start on April 13th, was ordered by the Democratic-controlled public utilities commission which was replaced recently by the state public service commission, composed of Republican members, through a decision of the state supreme court.

In announcing that the inquiry would be delayed indefinitely, Shilson explained that the commission "must have a little time to familiarize ourselves with the situation."

Board Makes Appointments

CLYDE M. Selden, of Lansing, was appointed head of the motor transport division, and Ray K. Holland, of Ann Arbor, chief engineer of the new state public service commission on April 17th.

John J. O'Hara, commission chairman, said other appointments would be made soon to fill positions vacated by the new commissioners when they succeeded the old public utilities commission.

Missouri

Accused of Illegal Gifts

FORFEITURE of the corporate charter of the Union Electric Company of Missouri was asked on April 20th by Prosecuting Attorney David A. Dyer in a suit accusing the utility of violating the state Corrupt Practices Act.

The petition, filed in circuit court, charged that the company had contributed financial aid to certain favored candidates in the St. Charles municipal elections of 1937 and 1938. These contributions, the suit asserted, were "A great harm and injury to the public and to its (Missouri's) form of government and are a misuse of the franchises granted to it (the company) by the state of Missouri."

Union Electric, a subsidiary of the North American Company, owns the Keokuk, Iowa, and Bagnell, Missouri, hydroelectric plants and distributes electricity in St. Louis and adjacent communities and, through subsidiaries, to towns in Illinois and Iowa.

The state corrupt practices statute makes it unlawful for any corporation to contribute money, directly or indirectly, to the campaign funds of any party or individual, and provides for charter forfeiture as a penalty.

Dyer also asked for an order enjoining the corporation from doing business in Missouri. This would not prevent operation of the utility properties owned by the company, under orders of the court.

Nebraska

Omits Operating Account

THE report of the Loup River Public Power District for 1938, filed with the governor recently, gave no figures covering its revenues and disbursements for 1938, although it has been operating most of the year. The report contained a footnote to the effect that depreciation and amortization schedules affecting income accounts had not been computed, pending further study, and were omitted.

Engineers were said to differ as to the amount of depreciation that should be charged yearly against electric power plants, whether 3 or 4 per cent on the total investment. At 3 per cent the amount to be set out of earnings on the Loup river plant would total $336,000 a year and at 4 per cent would be a third more.

The contract with the government requires that in each yearly payment of interest at 4 per cent on the $8,500,000 loaned there shall be included a sum that will retire the entire debt within thirty years. This calls for the payment of 5.7 per cent, interest and principal yearly, or about $500,000 a year.

The law requires that each year the board of directors shall cause to be made an audit of the books, records, and financial affairs of the district by a qualified public accountant, and that copies of the report be kept on file in the office of the district and sent to the governor.

At the governor's office it was noted that the report did not cover revenues and expenses, but it was stated that a more complete report would not be demanded because that would be equivalent to interpreting the meaning of the law when it refers to "an audit of books, records, and financial affairs."

Reassure Irrigators

C. B. FRICKE, Loup River Public Power District president, recently said Loup directors had passed a resolution assuring North Platte valley irrigators the district has no intention of seeking power markets in that area. Fricke was informed that directors of the Central Nebraska and Platte Valley Public Power and Irrigation districts would pass similar resolutions.

The irrigation program in the North Platte valley is financed in part by revenue from sale of power by the Federal reclamation service, and irrigation project representatives there

fear competition from the hydro districts would reduce their income from that source. Power is generated at the Guernsey dam, a supplementary reservoir to the Pathfinder dam near Casper, Wyoming.

Introduction of L. B. 185, controversial power bill pending in the state legislature, was aimed to prevent hydro competition in the North Platte valley area, its proponents have claimed.

New Jersey

Wakelee Named President

THOMAS N. McCarter, founder, and for thirty-six years president of the Public Service Corporation of New Jersey, relinquished his post on April 18th to Edmund W. Wakelee, formerly vice president in charge of the corporation's legal department. In line with recommendations which he made last March to the board of directors, Mr. McCarter was elected to the new position of chairman of the board.

Mr. McCarter's son, Thomas N. McCarter, Jr., was elected vice president in charge of the company's southern division at the meeting of the corporation's board of directors. Another new office created by the board, chairman of the executive committee, was filled by Percy S. Young, who has been an executive of the corporation since its formation in 1903.

In his new position, Mr. McCarter will remain the senior executive officer of the corporation with plenary powers of supervision and direction.

State Commission Reports

SAVINGS of $1,909,453 to New Jersey utility service consumers in 1938 were reported on April 20th by the state board of public utility commissioners. The board said users were paying $21,982,000 less today than ten years ago because of rate reductions.

The board said if savings over the ten years were lumped together they would total $110,387,000. The rate cuts, the board asserted in its annual report to Governor A. Harry Moore, included electric, gas, and telephone services.

In the four years from 1935 to 1938, inclusive, the board reported, electric companies have received $10,460,510 less in annual operating revenues as the result of downward revision of electric rates. Annual reduction in rates last year by electric companies were reported by the board as follows:

Public Service Electric and Gas Company, $1,251,400; New Jersey Power and Light Company, $282,949; Atlantic City Electric Company, $262,000; Jersey Central Power and Light Company, $17,480; South Jersey Power and Light Company, $8,616; Millville Electric Company, $7,300; and Rockland Electric Company, $2,000.

During 1938 the board authorized utility security issues totaling $29,100,683, mainly for refunding higher interest-bearing obligations for a year's saving of $207,959, it was stated in the report.

New York

"Little TVA" Bill Passed

REPUBLICAN legislative leaders recently predicted speedy senate passage of a bill which they contend would restrain the New Deal from utilizing New York state flood control projects for "little TVA's," and the development of electric power.

The measure, passed in the state assembly by a voice vote, gives to the Federal government, with strict limitations, lands to be used for flood control projects. Chairman Abbot Low Moffat of the assembly ways and means committee, expressed confidence that the bill would prevent establishment of miniature TVA's.

North Carolina

Fight Power Plant

TWELVE High Point corporations and fifteen citizens instituted suit in Guilford superior court last month to enjoin the city of High Point permanently from constructing its proposed $6,500,000 hydroelectric plant.

The complaint said that under its present policy of buying power from the Duke Power Company, the city was deriving an annual net profit of more than $200,000. Moreover, the complaint said, the Duke Company made the city an offer whereby High Point would realize an annual profit of $335,000.

The plaintiffs contended High Point's plan to "divert this revenue and profit in an effort

to successfully operate this hazardous undertaking" would further complicate the city's tax structure and increase taxes.

In accepting from the Federal Power Commission a "license affecting navigable waters of the United States," the city has been placed under the regulation and control of the Federal Power Commission, the complaint said. The plaintiffs said they had approximately 6,000 employees and paid taxes on $5,500,000 worth of property and were "vitally interested" in an economic administration for the city of High Point.

In discussing the pending litigation, Governor Hoey said he "very definitely opposed yielding to any contention that the Federal Power Commission has control of the Yadkin river." He made it clear that if the state tried to become a party to pending suits "it would not be in connection with the merits of the controversy, but only to protect the state's rights as to the Yadkin."

Oklahoma

Bill to Increase Bonded Indebtedness

THE Oklahoma senate recently was reported to have approved a house bill to increase the limit on bonded indebtedness of the Grand River Dam Authority from $15,000,000 to $25,000,000. Approval of the bill assured construction of Fort Gibson and Markham's Ferry dams to complete the electrification project.

The legislature previously made effective a recommendation of Governor Leon C. Philips that the number of members of the board of directors be reduced from nine to five.

The authority on April 20th forwarded to the Public Works Administration at Washington an application for additional funds which would increase the total cost of the project to $22,000,000. The amended application, prepared to conform to late estimates by PWA, included an increase making total anticipated land acquisition cost $2,662,000, an increase of $1,105,253 in dam construction cost and an added $654,000 for contingencies.

Pennsylvania

Dougherty Deal Shelved

PHILADELPHIA city council leaders recently shelved A. Webster Dougherty's offer to "purchase" rentals from the city-owned gas plant in favor of a more advantageous proposal reported being whipped into final shape.

Councilman Bernard Samuel, chairman of the finance committee, announced the plan was "being taken up actively by other interests" and should be ready for submission "very shortly." He added that the new proposal should be consummated very soon.

Dougherty himself, without actually withdrawing his bid, formally stepped aside "so the city may, if possible, obtain a more favorable offer, if such is forthcoming." Although Samuel was silent on particulars of the new plan, it was reported reliably to differ from Dougherty's offer in these respects:

1. The amount actually to be paid to the city by the "purchasers" would be $45,000,000, instead of $50,000,000.

2. The "purchasers" would not begin taking the $4,200,000 annual rentals until next year, leaving the 1939 receipts intact for the city. Thus the city really would have $49,200,000—ample to retire accumulated deficits and balance the overdue 1939 budget without imposing new taxes.

3. The transaction would be handled through a trustee rather than as corporate financing. The trustee would be immune from Federal and state corporate income taxes, to which Dougherty's Philadelphia Corporation would be subject.

The new plan was said to be the fruit of closed conferences between council leaders and representatives of leading Philadelphia financial institutions.

Tennessee

Corporation Files Charter

JO Conn Guild, Jr., president of the Tennessee Electric Power Company, and four others filed with the secretary of state on April 17th a charter creating the Tennessee Utilities Corporation with an authorized capital stock of $10,000,000.

The charter authorizes the corporation to engage in the manufacture and distribution of electric power and operation of transportation, water, ice, and telephone systems. TEPCO

officials explained that the new corporation would administer the business holdings remaining after the sale of the electric properties. Headquarters were listed for Chattanooga.

Judge John R. Aust, attorney for the new corporation, in connection with the filing of the charter, released the following statement by Wendell L. Willkie, president of the Commonwealth & Southern Corporation:

"Organization of this corporation is one of the necessary technical steps in connection with the liquidation of the Tennessee Electric Power Company, and sale of its electric properties by Commonwealth & Southern Corporation to the Tennessee Valley Authority and associated municipalities."

Vermont

Endorses Flood Control

GOVERNOR George D. Aiken last month said the Federal government could proceed with New England flood control at any time as far as his state was concerned. The governor added that it was "up to Massachusetts and New Hampshire, now, when the flood control program is started."

Legislation was reported pending before the legislatures of both states to give the Federal government jurisdiction over proposed reservoir and dam sites on the Merrimack and Connecticut rivers. Aiken said passage by the Vermont legislature of a statute requiring the government to obtain consent for acquiring land in his state would place no restriction on the government in carrying out flood control.

He said if the government wanted to develop water power at any of the sites, the new law, amending a 1933 act which had given the government blanket jurisdiction in the state, would not block such a proposal.

U. S. Senator Warren R. Austin, Republican of Vermont, said the legislation would require the Federal government to obtain state consent before starting any work in connection with flood control.

Wisconsin

REA Gives Million to Co-op

THE Federal Rural Electrification Administration last month allotted an additional $1,000,000 to the Tri-State Power Coöperative of Wisconsin, making $1,500,000 immediately available to construct a steam generating plant to serve 11 REA-financed distributing coöperatives in southwestern Wisconsin, and in nearby Minnesota and Iowa. The plant probably will be built at Genoa, south of La Crosse.

Allocation of the fund followed long negotiations for a lower wholesale rate from privately owned generating companies, REA Administrator John Carmody said. He estimated the coöperative generating plant would save the farmers' co-ops $65,000 a year in electricity rates, after paying all costs of generating the power, amortizing the loan, and interest.

Twenty thousand farmers are expected to use juice from the plant, an average of 75 kilowatt hours a month.

Co-op Tax Sought

AN annual license fee amounting to 3 per cent of their total gross receipts will be paid by rural electric coöperatives if a bill introduced last month by Assemblyman Walter Cook, Republican of Unity, becomes law. Of the revenue raised by the fees, $2,000 would go to the tax commission for administration of the law, 15 per cent of the remainder would be paid to counties in proportion to the miles of coöperative power lines within the borders of each county, and the rest would be paid to towns and cities on the basis of lineage. Towns and cities would use the money for school aid, it was said.

Assemblyman Andrew Biemiller, Progressive of Milwaukee, introduced his resolution of two years ago to amend the Constitution to permit the state to generate, buy, distribute, and sell power. The amendment would allow the state to act as a private corporation, and to borrow money to carry out a power program if the borrowing is approved by a statewide referendum.

Assembly Approves Rural Aid

CREATION of a Wisconsin Rural Electrification Coördination Division under the department of agriculture and markets was approved by the state assembly last month by voice vote and rushed to the senate under suspension of the rules.

The bill, introduced by Assemblyman Vernon Thomson, Republican of Richland Center, would provide $5,000 to the unit as soon as the bill becomes law, and $15,000 each year thereafter.

The agency would gather and disseminate information to aid rural electrical coöperatives and privately and municipally owned utilities. It also would be empowered to aid the Federal REA in carrying out its program in the state.

The Latest Utility Rulings

Judicial Review of Ruling on Intercorporate Telephone "Control"

THE United States Supreme Court upheld a finding that the Rochester Telephone Corporation is "under the control of the New York Telephone Company" within the meaning of a provision of the Federal Communications Act imposing various obligations upon a corporation so controlled. The court held that the record amply justified the commission in making its finding that through stock ownership the New York Company was the dominant financial factor in the Rochester Company. Mr. Justice Frankfurter, speaking for the Supreme Court, said:

> Investing the commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the commission's finding, disregards actualities in such intercorporate relations.

Aside from the court's decision on the merits of the case, the important ruling was made that "negative order" and "affirmative order" are not appropriate terms of art with respect to judicial review of commission orders. An objection to review of the commission's order had been raised on the ground that it was a "negative order." Mr. Justice Frankfurter, in his opinion, discussed the prior decisions involving the "negative order" doctrine and concluded that the considerations for which the notions of such orders were introduced are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality.

Under the primary jurisdiction doctrine, matters which call for technical knowledge pertaining to regulation must first be passed upon by the commission before a court can be invoked. Under the doctrine of administrative finality, only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. The court indicated that an order is reviewable if it is not a mere abstract declaration regarding the status of a company and if it is not at a stage in an incomplete process of administrative adjudication. *Rochester Telephone Corp. v. United States et al.*

Judicial Review of "Negative Order" Denying Approval of Merger

THE United States Supreme Court sustained a decision of the circuit court of appeals for the ninth circuit holding that an order of the Federal Power Commission denying an application for approval of a merger is reviewable under § 313(b) of the Federal Power Act. The commission had raised the question whether such an order was reviewable, arguing that it was a "negative order."

Mr. Justice Frankfurter, speaking for the court, said that if the Federal Power Act had formally taken over the statu-

tory provisions of the Urgent Deficiencies Act pertaining to review of orders of the Interstate Commerce Commission, the decision in Rochester Telephone Corp. *v.* United States would dispose of the case and sustain the assumption of jurisdiction.

But the Federal Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made, and Congress determines the scope of jurisdiction of the lower Federal courts. It was held, however, that in view of the wording of § 313(b) the statutory scheme of the Power Act only reinforced the analysis made in the Rochester Case. Mr. Justice Frankfurter said in part:

> But it is urged that review of the power commission's order does not present a "case" or "controversy," because the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the commission to grant such permission. And so it is claimed that any action of a court in setting aside the order of the commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. In none of the situations in which an action of the Interstate Commerce Commission or of a similar Federal regulatory body comes for scrutiny before a Federal court can judicial action supplant the discretionary authority of a commission. A Federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law in so far as they are relevant to the disposition made by the commission. ". . . a judgment rendered will be a final and indisputable basis of action between the commission and the defendant." Interstate Commerce Commission *v.* Baird (1904) 194 U. S. 25, 38. In making such a judgment the court does not intrude upon the province of the commission, while the constitutional requirements of "case" or "controversy" are satisfied. For purposes of judicial finality there is no more reason for assuming that a commission will disregard the discretion of a reviewing court than that a lower court will do so.

Federal Power Commission v. Pacific Power & Light Co. et al.

Motor Carrier Operation under "Grandfather Clause" of Motor Carrier Act

A LOWER court decision in favor of a motor carrier against the Interstate Commerce Commission was reversed by the United States Supreme Court in a case involving the interpretation of the "grandfather clause" of the Motor Carrier Act. In this case, as in other cases decided at the same term of court, the question of judicial review of a "negative order" arose, and the court held that there was no jurisdictional barrier to a review of the commission's order rejecting the carrier's claim for dispensation from the requirement that it prove public convenience and necessity because of prior operations.

The application of the carrier for authority to operate between Portland and Seattle, Oregon, and intermediate points was based upon its claim that its prior operations justified the granting of a certificate under the provision of the Motor Carrier Act that a person in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which the application is made, in the case of one who has so operated since then, entitles the carrier to a certificate.

The commission found that the carrier prior to that date had been engaged in quite different services from those for which it asked a certificate; namely, an irregular so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington over any route adapted to a particular trip, but using, at least for part of the distance, the same highway involved in its application. A regular route had been established several months after June 1, 1935. Mr. Justice Frankfurter declared:

> Applying these findings which are binding here, the commission ruled that the appellee

did not bring himself within the privilege of the "grandfather clause." In making this application of the statute, the commission properly construed it.

The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the "route or routes" for which an application under the "grandfather clause" is made as against operations "within the territory," Congress plainly adopted the familiar distinction between "anywhere-for-hire" bus operations over irregular routes and regular route bus operations between fixed termini. . . . Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated," as required by § 206, when the commission passed upon the application for a "grandfather" certificate, the commission rightly rejected the application.

The court also held that the commission after rejecting the application under the "grandfather clause" was not required to canvass all the questions of public and private interest to determine whether the certificate should be granted on the basis of public convenience and necessity, when the applicant himself sought only the favor of the "grandfather clause" and made no claim, either before the commission or in his bill seeking to enjoin its action, to have the commission act outside the "grandfather clause." *United States et al. v. Maher.*

Right of Utility to Resist Municipal Competition

THE supreme court of Alabama affirmed a decree of a lower court sustaining a demurrer to a bill seeking to enjoin a municipality from constructing an electric transmission line to be connected with a similar line operated by the TVA. The action was begun by a private utility operating under a non-exclusive franchise.

In sustaining the demurrer to the complaint, the court said that an electric company which pays taxes on its property within the city, and pays a license fee for the privilege of doing business under its franchise, is not an inhabitant of the municipality and does not, therefore, show such an interest as warrants the interference of a court of equity.

The court stated that the municipality did not become a public utility within the purview of the statute which gave the public service commission jurisdiction thereover and required the granting of a certificate of convenience and necessity as a condition precedent to operation.

With regard to serving customers outside the city limits, the court said:

> Moreover, there is clearly a sound basis for classification, to include the one and exclude the other from the exercise of such power. The defendant municipality, by its nature and elements, is a nonprofit-producing governmental agency, and engages in proprietary enterprises for the purposes of serving its own inhabitants, and if it serves others outside its corporate limits, it must do so at the same rate it serves its own inhabitants. Montgomery *v.* Greene (1913) 180 Ala. 322, 60 So. 900.

In conclusion the court stated that the complainant showed no such interest as authorized it to question the right of the municipality to issue bonds payable out of the revenue of the proposed system, and not a general obligation of the city, nor the regularity and validity of the election to authorize such issue. *Birmingham Electric Co. v. City of Bessemer et al. 186 So. 569.*

Removal of Spur Tracks from Private Land

THE court of civil appeals of Texas upheld a decision for plaintiff in a suit for damages, allegedly sustained by the removal of a spur track, on the ground that the railroad did not have the right of eminent domain in this particular case.

It was held that such spur track became a fixture and passed with the title to the real estate where the ties were im-

bedded in the soil, the landowner had built about 200 feet of track at his own expense, and the railroad required his written consent to spot cars thereon.

The court stated that it was aware of a line of cases holding that the superstructure of a railway company when placed upon the land of another without his consent does not become a part of the realty. The court said that such cases apply where the use of the railroad track and the land on which it is placed is generally quite different.

It was held that where there is a private switch for private use, the railroad company does not have the right of eminent domain, and the evidence showed this track to be for private use.

The court, in abiding by a previous case, held that where railroad tracks are installed solely to serve the private enterprise of the landowner, constructed and maintained at his expense, and used for his purposes only, the railroad's right to remove them depends on whether or not they are fixtures. *Texas & New Orleans Railroad Company v. Schoenfeld et al. 124 S.W. (2d) 910.*

Court Affirms Decision on Payment Of System Expenses

THE U. S. Circuit Court of Appeals affirmed the decision of Federal Judge Robert P. Patterson in dismissing the motion of the New York State Electric & Gas Corporation to enjoin the state public service commission from enforcing its order relating to the payment of "system expenses" by certain public utility companies.

The public service commission, after extended hearing, prohibited the extension of any existing contracts providing for the payment of so-called "system expenses," including payment to corporations for managerial, engineering, purchasing, auditing, and advertising services. The order was directed at the plaintiff corporation, Elmira Water, Light & Railroad Company, New York Central Electrical Corporation, Empire Gas & Electric Company, Staten Island Edison Corporation, Rochester Gas & Electrical Corporation, Oswego Gas Company, and several other public utility companies. *New York State Elec. & Gas Corp. v. Maltbie.*

Telephone Rates for Metropolitan Area Reduced

A JUDGMENT of the district court of Minnesota holding that an order of the commission reducing telephone rates for exchange service within a metropolitan area was reasonable and valid has been affirmed by the state supreme court.

First of all, the court dealt with the question whether the utility company had been accorded due process of law within the Fourteenth Amendment of the Constitution. As to this it was said that in rate proceedings the commission must make findings of fact sufficiently specific to enable the court to determine whether it has complied with all statutory requirements and whether all substantial rights of the company have been observed.

The opinion stated that where the legislature itself fixes rates, acting within the field of legislative discretion, its determinations are conclusive; and where the legislature establishes a rate-fixing body to act within this same field, it may endow such body with power to make findings of fact which are conclusive, provided the requirements of due process are met by according a fair hearing and acting upon the evidence not arbitrarily. It was decided that due process had been accorded the company by the commis-

sion in respect to its findings of fact.

In determining whether or not a rate is confiscatory, the court said, it must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests, and the court will not interfere with the rate-making power of the commission unless confiscation is clearly established.

The opinion also contained the following statement:

> Having devoted its property to the public service, the company is required to render service upon demand; it is entitled to reasonable compensation for the services so rendered because its property is as effectually confiscated by requiring its use for inadequate compensation as by a taking for less than its true worth. The just compensation assured a utility by the Fourteenth Amendment, Const. USCA, is a reasonable return on the value of the property at the time it is used in the public service. Rates which do not afford this return are confiscatory. While this is the aspect of the rule most often regarded, it is also true that the company's monopoly which is granted and protected by the state ought not to be exerted to the public detriment as a means of imposing oppressive rates.

As to fair return the court stated that it is computed with reference to fair value of property used in rendering that service, the rates for which are in controversy.

In fixing the fair value of such property the court felt it proper to consider historical cost (cost of the original plant plus additions less retirements and accrued depreciation) provided consideration is given to changes in the price level; reproduction cost at the time of the inquiry, less accrued depreciation, provided the reproduction costs of the components can be found with reasonable certainty; the financial history of the company, and all other relevant facts.

It was concluded that the findings of the trial court showed that full consideration was given every element affecting the rate base, and the valuation allowed by the court was reasonably adequate. *State v. Tri-State Telephone & Telegraph Co. 284 N.W. 294.*

Carriage of Laborers for Government Held Subject to Regulation

THE court of appeals of Maryland ruled that motor carriers who equipped and insured their trucks as owners, had their own employees drive such trucks, and entered into a contract with the Federal government to carry Federal employees between fixed termini for a fixed period of time, are contract carriers within the purview of a statute which requires the licensing of all motor vehicles for hire on regular schedules between fixed termini. In so holding the court reversed a decree of a lower court. The requirements that a permit be secured to operate over the highways, that the application for such permit state the proposed route to be used in the carriage of passengers, and that a license fee be paid as conditions precedent to operation were considered by the court to be reasonable requirements for safeguarding use of the highways for gain. For that reason the court felt that there could be no constitutional objection thereto.

The contract of carriage was specifically dealt with by the court when it said:

> In the fact that the contract was a provision for definite, limited work of one owner, the United States government, to cease in eleven months at most, we find no reason for saving it from the operation of the statute. It was none the less a use of the roads of the state for hire, in carrying passengers. And there would, we think, be few if any, private contracts for conveyance not limited to specific purposes and times, too few at least to permit us to suppose that the legislation was enacted to reach those only.

The court went on to say that in regulating operation of contract motor carriers for hire upon state highways the commission may, so long as it does not require the owners to devote the vehicles to the public service, be guided by the

effect of it on existing public service.

Here it was found that the operation would not constitute competition with existing public service. For that reason, the court held, complete stoppage of the road service could be grounded only on failure to comply with the statutory requirements pertinent to the licensing of motor carriers for hire. Reversal was based upon such findings. *Baltimore & A. R. Co. v. Lichtenberg et al. 4 A. (2d) 734.*

Other Important Rulings

THE railroad commission of California, in prescribing accounting procedure relating to the retirement of investment in electric plant account, said that retirements credited to transmission and distribution plant accounts may be based on the average unit costs by groups of identical units and geographical areas, since because of the large number of small items of property that enter into said transmission and distribution capital accounts, it may be impractical to determine the cost of each item of property. *Re Electric Plant Accounts (Decision No. 31618, Case No. 4379).*

The Michigan commission held that a roadway telephone association should not own, maintain, and install telephone instruments connected to lines which are connected to the dial type of central office equipment, in view of the complicated operation and the consequent added necessary maintenance of dial type service, making it essential that the instruments be owned, installed, and maintained by the telephone company to insure adequate and satisfactory service to all subscribers. *Re Lake City Telephone Co. (T-405-39.1).*

The Minnesota commission held that applicants for construction of a railroad crossing should bear the expense where the establishment of the crossing is solely for their convenience and benefit and where there are other crossings provided near by. *Re Beaver Creek Township Board (A-3376-2, 18 D-476b).*

The supreme court of North Carolina, in affirming a judgment for the plaintiff, said that a motor carrier authorized to operate on the state highway can hire a motor vehicle to make some particular trip and such vehicle is operated by the authorized carrier under its certificate of convenience and necessity and need not be licensed. *Brownlee v. Charleston Motor Express Co. 200 S.E. 819.*

The Wisconsin commission, in denying an application for authority to issue bonds, observed that the company at the time had authority to issue common stock for the same purposes for which it applied in part to issue bonds, and the commission said that obviously this duplication should not be permitted. *Re Nelson Telephone Co. (2-SB-117).*

The Wisconsin commission held that a toll rate in one direction should not be different from the rate for calls in the other direction over the same wires unless some condition existed to justify such difference, and the commission also held that toll rates should be uniform for all routes of similar distances and traffic. *Jefferds et al. v. Farmers Union Telephone Co. et al. (2-U-1335).*

When a public utility files with the public utilities commission an application for modification of gas rates and also an appeal from a rate-fixing ordinance, the commission is required to dismiss the application and proceed under the appeal, it has been held by the supreme court of Ohio. *Northwestern Ohio Natural Gas Co. v. Public Utilities Commission, 19 N.E. (2d) 648.*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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VOLUME 27 P.U.R.(N.S.) NUMBER 5

Points of Special Interest

Titles and Index

TITLES

INDEX

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT

Illinois Bell Telephone Company

v.

James M. Slattery et al.

[No. 6671.]

(102 F. (2d) 58.)

Appeal and review, § 13 — Proper court — Review of district court decree.

1. The circuit court of appeals has jurisdiction of an appeal from a decree of a 3-judge statutory court disposing of funds impounded to provide for refunds of overcharges by a telephone company upon a termination of rate litigation adversely to the company, and such jurisdiction is not barred because the decree involves a construction of the mandate of the Supreme Court requiring such refunds, p. 263.

Appeal and review, § 70 — Reversal and remand — Duty of lower court — Distribution of impounded funds.

2. The jurisdiction of a district court, following reversal by the United States Supreme Court and remand of the case with directions to provide for refunding of impounded funds, is not limited to granting only such relief as was directed by the mandate of the Supreme Court, but the lower court has jurisdiction to give consideration to any question left open by the mandate and opinion of the Supreme Court, p. 263.

Appeal and review, § 70 — Reversal and remand — Jurisdiction of lower court — Claims to impounded funds.

3. A Federal district court to which the Supreme Court has remanded a case with directions to provide for refunding impounded funds in a rate controversy has jurisdiction not only to provide for such refunds but to pass upon a claim by a state to impounded funds unclaimed by ratepayers, since such claim is wholly unrelated to the question of refunds, p. 263.

Injunction, § 53 — Decree as to impounded funds — Finality — Unclaimed refunds — Claim of state.

4. A decree, following dissolution of an injunction against the enforcement of a rate order, providing for distribution to ratepayers of impounded funds and providing that a utility company after a specified date shall be released as to all refunds which it has not been able to make in compliance with the decree, but making no provision for the disposition of funds which might remain in the possession of the utility company unclaimed by ratepayers, does not preclude the court from entertaining a claim by the state to such unclaimed refunds; the decree, although releasing the company from claims by ratepayers after the expiration of the limitation fixed, does not release it so far as the state is concerned, and the decree is not a final adjudication of the company's liability as to the funds, p. 265.

Appeal and review, § 25 — Scope of review — Findings of fact or of law.

5. The construction to be placed upon a decree of a district court, as to whether it is a final decree and finally disposes of all questions before the court, is one of law rather than of fact, and it is the duty of the appellate court to make a determination as to the finality of the decree and the effect which it had upon the parties before the court, p. 265.

Injunction, § 53 — Decree as to impounded funds — Time limitation — Interpretation.

6. A provision in a decree, relating to the distribution of impounded funds following termination of a rate controversy adverse to a utility company, that after a specified date the company shall be released as to all refunds which it has not been able to make in compliance with decrees of the court, is not merely a provision as to inquiry rather than a limitation, and after expiration of the time specified the company is released from any liability in so far as ratepayers are concerned, p. 268.

Reparation, § 43 — Impounded funds — Relationship of company to ratepayers.

7. The relation between a public utility company and ratepayers with respect to impounded funds is merely that of debtor and creditor, where it appears that overcharges covered by the impounded funds in the possession of the company are not earmarked or separated, that the company is liable for interest on overcharges, and that the company was permitted to offset against such overcharges debts due from ratepayers, p. 268.

Reparation, § 50 — Time limitation — Extinguishment of claim.

8. Where a public utility company is required to refund impounded funds to ratepayers pursuant to a decree which provides that after a specified time the company shall be released as to unclaimed funds (the relationship between the company and the ratepayers being that of debtor and creditor), the ratepayers at the expiration of the limitation period are not only without remedy to assert a claim, but the debt owing by the company is extinguished, p. 268.

Reparation, § 43 — Claim to impounded funds — Unclaimed refunds — Time limitation — Rights of state.

9. A state has no claim to funds impounded for refund of overcharges, but unclaimed by ratepayers within the time limitation provided in the decree for distribution of the impounded funds, when by reason of the expiration of the time limitation the subscribers are neither in possession of or the owner of any property or right of claim thereto; there is nothing for the state to take on the theory that it is entitled to unclaimed or unowned property, p. 269.

Bona vacantia — Validity of doctrine — Claim to unowned property.

10. The doctrine of bona vacantia—the rule that the sovereign is entitled to property which has no other owner—rests upon common law of such an uncertain and indefinite nature in its scope and limitation that the court would not be justified in proclaiming its existence as a rule of law of Illinois applicable to a situation where the state claims funds impounded in a rate case for the benefit of ratepayers, but unclaimed by them, p. 269.

[February 22, 1939.]

APPEAL *from decree of United States District Court denying a claim of the state of Illinois to unclaimed refunds in the possession of a telephone company; decree affirmed.*

APPEARANCES: Kenneth F. Burgess, Leslie N. Jones, W. Clyde Jones, and D. Robert Thomas, Attorneys for appellee (Sidley, McPherson, Austin & Burgess, of counsel); John E. Cassidy, Attorney General, state of Illinois, Attorneys for defendants-appellants (Harry R. Booth, Thomas A. Keegan, Abe L. Stein, John P. Barnes, and Frederick Zazove, of counsel).

MAJOR, C. J.: This is an appeal from a decree of the district court, specially constituted under § 266 of the Judicial Code, entered February 5, 1938, denying the claim of the state of Illinois, one of the defendants, to unclaimed refunds in the possession of the plaintiff.

On August 16, 1923 (P.U.R. 1924A, 213), the Illinois Commerce Commission entered an order reducing certain of the plaintiff's rates for telephone coin-box service in the city of Chicago. Plaintiff filed its bill of complaint in the Federal district court on September 20, 1923, praying that an injunction be entered permanently restraining the persons constituting the Illinois Commerce Commission and the attorney general from enforcing the order. On December 21, 1923, an interlocutory injunction was granted by the statutory court which contained the following provision:

"This order shall not take effect until the plaintiff shall enter into its bond or undertaking in the sum of $1,000,000 conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by a temporary restraining order heretofore, on September 27, 1923, entered in this cause by this court or by this interlocutory injunction, and further conditioned so that in the event that this interlocutory injunction shall be hereafter dissolved, the plaintiff shall refund to its several subscribers, either in cash or by credit upon subsequent bills, any sums paid by them in excess of the sums chargeable to them, pursuant to the provisions of said order of the Illinois Commerce Commission."

On March 1, 1931, an additional bond of $5,000,000 was required conditioned upon the event that if the interlocutory injunction was thereafter dissolved, the plaintiff should ". . . well and truly repay to each or any of its subscribers, or to the persons entitled thereto, with interest, either in cash or by credit on subsequent bills, and in such way and manner as the said district court of the United States, for the northern district of Illinois, may hereafter direct, any sums paid by the said subscribers to the plaintiff for telephone service rendered such subscribers, in excess of the sums chargeable to said subscribers, or any of them, pursuant to the provisions of the said order of the Illinois Commerce Commission, during the period from the date of said temporary restraining order to the date of the final decree that may be hereafter entered, the enforcement of which is enjoined, . . ."

After various proceedings in which the case has on four occasions been in the Supreme Court of the United States ([1925] 269 U. S. 531, 70 L. ed. 397, 46 S. Ct. 22; [1930] 282 U. S. 133, 75 L. ed. 255, P.U.R.1931A, 1, 51 S. Ct. 65; [1931] 283 U. S. 808, 75 L. ed. 1427, 51 S. Ct. 646; [1931] 283 U. S. 794, 75 L. ed. 1419, 51 S.

Ct. 482) a decree of permanent injunction was entered on June 28, 1933, which, upon appeal, the Supreme Court in Lindheimer v. Illinois Bell Teleph. Co. (1934) 292 U. S. 151, 78 L. ed. 1182, 3 P.U.R.(N.S.) 337, 54 S. Ct. 658, reversed and remanded the case with directions "to dissolve the interlocutory injunction, to provide for the refunding, in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the company in excess of the rates in suit, and to dismiss the bill of complaint." The mandate of the Supreme Court was filed in the district court on June 1, 1934, and a decree was entered vacating the decree of June 28, 1933, dissolving the interlocutory injunction, directing that the defendants should be paid their taxable costs, appointing counsel to represent subscribers and ordering them to prepare and present within seven days a plan for the refunding of excess charges to the subscribers. This decree provided for the retention of jurisdiction in the following language:

"To the end that refunds shall be made as required by the mandate of the Supreme Court, this court reserves and retains jurisdiction of this cause, the parties and the subject matter, to the end that such further orders and decrees shall be entered herein as may be appropriate to protect and settle the equities or rights of the parties hereto and of the several subscribers of the plaintiff and of all persons having rights under bonds given herein or injunction issued, or in the refunds of the amounts charged by the plaintiff in excess of the rates fixed by the said order of the Illinois Commerce Commission of August 16, 1923; and to provide for the refunding and restitution of such amounts and interest thereon to those who may be entitled thereto";

Thereafter, on June 11, 1934, counsel for the subscribers presented their report in which they suggested a plan for making refunds. Among other things it was suggested that the payments should be made directly by plaintiff rather than requiring the money to be paid into court and distributed by a special master, for the reason that plaintiff was agreeable to undertake such work and to assume the expenses thereof, and also for the reason that plaintiff was in the better position to make such refunds than anyone else. It was also suggested that plaintiff be required to make such refunds within a reasonable period. On June 11, 1934, a decree was entered containing elaborate provisions for the making of such refunds, together with 5 per cent interest thereon, in conformity with the suggestions made by counsel for the subscribers. The decree contained provision for the giving of notice by the plaintiff to its subscribers and fixing June 1, 1937, as the expiration of the period during which claims might be filed and provided.

"On and after that date, to wit: June 1, 1937, plaintiff shall be released as to all refunds which it has not been able to make in compliance herewith except as to those subscribers who during said six months' period (or prior thereto) shall have made claim theretofore to the plaintiff, and except, further, as to those refunds respecting which questions are pending before this court at that time or where the

matter of refund is in dispute between the subscriber and plaintiff."

It was also provided that plaintiff pay to the city of Chicago the sum of $69,590.70 and to the attorney general for himself and the Illinois Commerce Commission, the sum of $100, which amounts were determined and fixed as taxable costs such parties were entitled to recover. The last paragraph of such decree is as follows:

"The court hereby reserves the right to make such other and further orders herein as shall preserve the rights of the subscribers of plaintiff to the refunds herein directed or as shall be necessary to settle questions arising hereunder."

At the time of the entry of this decree, counsel for all interested parties, including the attorney general as counsel for the Illinois Commerce Commission, as well as the state of Illinois, was present in court and either consented or made no objection to the entry of such decree. On July 23, 1934, a decree was entered which fixed and determined the fees to counsel for subscribers at 7½ per cent of all refunds, whether or not distributed by June 1, 1937. On December 31, 1934, a decree designated as supplemental to that of June 11, 1934, was entered containing additional provisions with reference to the making of refunds by plaintiff in which decree it was again provided "plaintiff shall be released as to all refunds which it has not been able to make in compliance with this and such former decrees," and concludes "the court hereby reserves the right to make such other and further orders herein as shall preserve the rights of plaintiff and the rights of its subscribers to the refunds directed to be paid by the decrees of this court, or as shall be necessary or desirable to settle and dispose of questions arising under this and other decrees of this court."

Plaintiff commenced the work of making refunds immediately following the decree of June 1, 1934, and employed as many as 2,000 people at one time for that purpose. The work was performed under the supervision of a representative appointed by the court and during the three years subsequent to June 1, 1934, made to the court numerous reports of its progress and its efforts to locate subscribers who might be entitled to a refund. On June 2, 1937, at the expiration of the 3-year period provided for in the decree of June 11, 1934, plaintiff filed its final report which disclosed that the total amount of overcharge, with interest, was $18,798,980.14, of which amount $4,074,254.15 represented interest and that there remained unrefunded the sum of $1,688,295.68.

On June 3, 1937, the plaintiff filed a petition reciting that the period for making refunds had expired and that it had complied with all former decrees and that it had incurred expenses to the extent of $2,700,000 in making the refunds. The petition prayed, among other things, that an order be entered permitting the plaintiff to destroy the records relating to the refunds, discharge it from any further liability for refunds, and ". . . further finding and adjudging that any sums unrefunded after payment of all proper claims filed on or before June 1, 1937, are and shall remain the property of the plaintiff, Illinois Bell Telephone Company."

On June 14, 1937, the state of Illi-

nois presented a petition in the name of attorney general asking that the Illinois Commerce Commission be reimbursed for expenses it had incurred during the prior litigation and that the balance of the unrefunded moneys be turned over to the treasurer of the state of Illinois as a trustee for such subscribers as had not made application for refunds prior to June 1, 1937. December 23, 1937, the district court rendered an opinion in which it held that the state was not entitled to the unrefunded balance because no statute existed authorizing such allowance, because the Illinois Commerce Commission had not acted as the agent of the subscribers and for the further reason that such relief was not in harmony with the mandate of the United States Supreme Court, and therefore, the court was without jurisdiction. Thereafter, on January 21, 1938, the attorney general filed a supplemental petition in which it was recited, among other things, "that though every reasonable effort has been made to locate and repay to subscribers the money due them, as directed by the mandate of the Supreme Court of the United States dated May 31, 1934, the sum of approximately $1,600,000 remains unclaimed in the custody and possession of the plaintiff as of June 1, 1937," and in which petition it was represented that such unclaimed refunds were ownerless and therefore the property of the state of Illinois in its sovereign right as the owner of all property having no other owner. The petition contained a prayer to the effect that an order be entered directing the plaintiff to pay over to the treasurer of the state of Illinois, money in its possession as of June 1, 1937, representing sums collected from October 16, 1923, to June 1, 1934, in excess of the rates fixed by the order of the Illinois Commerce Commission dated August 16, 1923 (P.U.R.1924A, 213), as the absolute property of the state of Illinois. On January 24, 1938, the supplemental petition was denied.

February 5, 1938, the court entered a decree finding, among other things, "that the decree previously entered by this court on June 11, 1934, was a final decree and finally disposed of all the questions then and now before the court; that all the parties consented to the entry of the decree and that the parties objecting at this time were before this court when said decree was entered and consented thereto, and that the claims of the customers who have not made application for refunds are now barred by the decree of this court." In the same decree the sum of $60,000 was awarded to the state of Illinois to reimburse it for expenses incurred by the Illinois Commerce Commission and $37,000 to the city of Chicago for additional expenses which it had incurred, and for which it had not been reimbursed, and decreeing, upon making such payments, the plaintiff "is discharged in full from all liability under the previous final decree of this court and the jurisdiction of this court over said proceedings and over said accounting ceases." From this decree the state appealed to this court. The plaintiff filed a motion to dismiss, attacking our jurisdiction, which motion was overruled August 9, 1938. Illinois Bell Teleph. Co. v. Slattery, 98 F. (2d) 930.

The essential questions to be determined upon this appeal are, 1st: Has this court jurisdiction to enter-

tain the appeal? 2nd: If so, was the decree of the statutory court, entered February 5, 1938, denying the relief prayed for in the petitions of the attorney general, erroneous? This involves the jurisdiction of the court to entertain such petitions and also the question as to whether its former decree of June 11, 1934, was final, thereby precluding an allowance of the relief sought. If jurisdiction exists and its former decree be held not determinative of the issue presented, was the state of Illinois entitled to the unpaid refunds under a common law principle known as bona vacantia?

[1] As to the question of our jurisdiction, it is urged that an appeal from a 3-judge statutory court lies only to the Supreme Court of the United States; that the question presented by the appeal involves a construction of the mandate of the Supreme Court, and therefore that court and no other has jurisdiction. Notwithstanding the fact that this jurisdictional question has heretofore had our careful consideration, we have, on account of the importance of the matter, again made a study of the situation presented in this respect and find no reason to change the conclusion heretofore reached. Inasmuch as our reasoning and conclusion is found in Illinois Bell Teleph. Co. v. Slattery, *supra,* no useful purpose would be served in a further discussion of the question.

[2, 3] Of importance in determining the validity of the decree here assailed, is the construction and effect to be given to the decree of June 11, 1934. Plaintiff argues that that decree was final, and that by its express terms, plaintiff was released from all liability after June 1, 1937, and that the attorney general, as the representative of the state of Illinois, being present at the time of its entry and not appealing, therefrom, is bound, and thereby precluded from asserting its claim now in controversy. It is also argued that the court had no jurisdiction in the matter except to perform those acts necessary in the execution of the mandate of the Supreme Court and that inasmuch as such mandate makes no provision for the disposition of unclaimed refunds by subscribers, that the court below was without jurisdiction. On the other hand, it is contended by the defendant, that notwithstanding that it was in court by its attorney general at the time of the entry of the decree, and consented thereto, it is not a final decree in that it makes no provision for the disposition of the unclaimed refunds; that such matter was not considered by the court or any of the parties at the time of the entry of the decree and that as a matter of fact, the state, at that time, could have urged no claim and was not in a position to do so until after June 1, 1937, as it was not before that date that it was possible to determine that any unclaimed refund would remain in the custody and possession of the plaintiff. It is also urged by the defendant, not only that the court expressly retained jurisdiction, but that irrespective of such retention, it had jurisdiction, of the parties and the subject matter and that, under its general equity powers, had jurisdiction to entertain the claim which the state presented subsequent to the time when it was determined that such fund remained in the possession of the plaintiff.

To our minds the court's conclusion

that it was without jurisdiction to entertain the claim of the state of Illinois and its construction of its decree of June 11, 1934, are so interwoven that they may be properly considered together. With reference to its jurisdiction, the court said:

"We are limited in our jurisdiction to granting only such relief as is in harmony with the mandate of the United States Supreme Court. The decree which we were authorized to enter was determined by the opinion and mandate of the United States Supreme Court. As we read that decision and as we now read it, we were only authorized to made refunds in accordance with the terms of the injunction and of the bond given pursuant thereto. This being so, and as we again read the injunction and the bond and construe the word 'refund,' we find ourselves limited to directing the telephone company to pay excess charges to its customers."

The mandate of the Supreme Court, issued May 31, 1934, contained the following directions:

"The decree of the said district court, in this cause be, and the same is hereby reversed with costs . . . and the same is hereby, remanded to the said district court with directions to dissolve the interlocutory injunction, to provide for the refunding, in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the company in excess of the rates in suit, and to dismiss the bill of complaint."

With the conclusion of the lower court that its jurisdiction was limited in granting only such relief as was directed by this mandate, we do not agree. Admittedly, it is the duty of an inferior court to carry into execution the terms of a Supreme Court mandate, but it does not follow from this that the court is without jurisdiction to give consideration to any question left open by the mandate and opinion of such court. Here, no question was before the Supreme Court as to the right of the state of Illinois in unclaimed refunds or of the right of any other agency or person to such refunds. The effect given to the mandate was considered by us on the question of our jurisdiction in Illinois Bell Teleph. Co. v Slattery, *supra*, at p. 932 of 98 F. (2d). We repeat what we there said:

"It would seem that the construing of a mandate presupposes that a problem has been presented to an appellate court and that the court has passed upon the problem and returned it to the lower court with its command. On the original appeal to the Supreme Court, the sole problem was the validity of an order of the Illinois Commerce Commission directing the reduction of certain telephone rates. Defendants in the instant matter contended before the court below that they, and they alone, were entitled, by reason of their status as a sovereign, to all unclaimed ownerless personal property. That question was not an issue between the parties to the original suit and was not involved in the original appeal to the Supreme Court. The question did not arise until June 1, 1937, when some $1,600,000 was found to remain unclaimed. Under such circumstances, the Supreme Court, in its opinion, did not touch upon the question and neither did its mandate, either expressly or impliedly. The only provision in

the mandate here material was that for the refunding, in accordance with the terms of the injunction and the bond given pursuant thereto of the amounts charged by plaintiff in excess of the rates as fixed by the Commission. By the express language of each, as heretofore related, such refund was for the benefit of plaintiff's subscribers. It is apparent that the court below neither failed nor refused to carry out the mandate of the Supreme Court, nor has it misconstrued it. On the other hand, the mandate has been fully and completely executed. To hold otherwise is to read into the mandate something which is not there and which, from the nature of the situation, could not properly be there."

Undoubtedly, the court at all times had jurisdiction of the parties and of the subject matter, and when a new and different question arose, such as that here presented, one not considered by the Supreme Court in its opinion, or directions given with reference thereto in its mandate, the court was not foreclosed by lack of jurisdiction to give consideration thereto.

In Ex parte Union Steamboat Co. (1900) 178 U. S. 317, 319, 44 L. ed. 1084, 20 S. Ct. 904, the court said:

"The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court, Re Sanford Fork & Tool Co. (1895) 160 U. S. 247, 256, 40 L. ed. 414, 16 S. Ct. 291, and the opinion of this court may be consulted to ascertain exactly what was decided and settled."

In Re Sanford Fork & Tool Co. *supra*, at p. 256 of 160 U. S. the Court said:

"But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. (Citing cases.)"

To the same effect is Mason v. Pewabic Mining Co. (1894) 153 U. S. 361, 38 L. ed. 745, 14 S. Ct. 847.

Admittedly, as the court below stated, it was only authorized to make refunds in accordance with the Supreme Court mandate. The word "refund" as defined by Bouvier's Law Dictionary, Vol. 3, p. 2856 is: "To pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid." Here, the state of Illinois is asserting a claim wholly unrelated to a question of refunds. It is based upon a promise foreign thereto. We do not think it can be precluded on jurisdictional grounds from asserting such claim.

[4, 5] This brings us to the question as to whether the decree of June 11, 1934, was a final adjudication of plaintiff's liability as to the funds which it has in its possession by reason of the collection of rates greater than those prescribed. That it was final in so far as it pertained to the execution of the mandate of the Supreme Court, we think is apparent, but in our judgment, it does not necessarily follow that it was final as to the claim which was subsequently presented by the state and which we are now considering. It recited "on and after that date, to wit: June 1, 1937, plaintiff shall be released as to all refunds which it has not been able to make in compliance herewith . . . ." The reasonable interpretation of that language is that

the plaintiff was released from any claims which might be presented by the subscribers after the expiration of the limitation fixed, but it does not follow that by such provision it was released so far as the state was concerned. As heretofore stated, the claim of the state is predicated upon a theory other and different from those who are entitled to refunds. A reading of this decree, as well as what transpired in the court at the time of its entry, and subsequently, convinces us that neither the court nor any of the parties at that time had in mind, intended to or made provision for the disposition of funds which might remain in the possession of the plaintiff, unclaimed by subscribers, after June 1, 1937, nor that there was any intention to release plaintiff of any liability for such unclaimed funds.

At the time of the entry of the decree of June 11, 1934, the court, as well as the parties, without doubt, was vitally interested in adopting a plan which would permit the refunding by the plaintiff to its subscribers of the money in its possession as expeditiously as possible. Not only was such a course consistent with the mandate of the Supreme Court, but also was consistent with the public importance of the matter involved. A careful and methodical plan was adopted. It is now argued that the present position of the attorney general is inconsistent with the approval which he accorded the decree at that time. We do not think so. No doubt that official of the state was as greatly interested in having an expeditious distribution of the funds as anyone else, and we see no occasion why he should, at that time, object to the decree because no provision was made for any rights which the state might claim in that portion of the funds not distributed according to the decree. In fact, it could not be determined until June 1, 1937, that any of such funds would remain in the possession of the plaintiff. For the attorney general to have raised the question at the time of the entry of the decree would, perhaps, have resulted in nothing more than delay and confusion in the adoption of the plan proposed. What reason would have moved a court at that time to consider a question, the relevancy of which could not be ascertained until three years later? We apprehend that an appeal from that decree, raising the question as to the rights which the state might have after the expiration of the 3-year period, would have received scant consideration in an appellate tribunal. Plaintiff premises a rather critical argument on the fact that the attorney general first made claim to the unrefunded balance after June 1, 1937, and yet, so far as we are able to discover from the record, the first time plaintiff asserted title to such money was on June 31, 1937, when, by petition, it prayed for an order discharging it from any further liability and that such sums unrefunded "shall remain the property of the plaintiff, Illinois Bell Telephone Company." While this request might have been of a precautionary nature, yet it seems apparent that it was an idle gesture if the decree of June 11, 1934, was final and released plaintiff from all liability as to the unclaimed funds as is now contended.

The court, in its decree of June 11, 1934, reserved such jurisdiction "as shall be necessary to settle questions

arising hereunder." Again, on December 31, 1934, the court reserved such jurisdiction "as shall be necessary or desirable to settle and dispose of questions arising under this and other decrees of this court." We think, however, no express reservation was necessary, as the court continued to have control of the parties and the subject matter. In fact, the court gave recognition to its continuing jurisdiction of the subject matter by its order of July 23, 1934, fixing fees to counsel for the subscribers at a certain per cent of the total overcharge and in not confining the per cent of the refunds made to the subscribers. Again, as late as February 5, 1938, in the order appealed from, the court awarded to the state of Illinois the sum of $60,000, and to the city of Chicago, the sum of $37,000 for additional expenses incurred by the state and the city respectively in the involved litigation. These sums, of course, must be paid from the funds remaining in the possession of the plaintiff.

The court, in connection with the decree under consideration, adopted certain findings of fact, included in which is the following:

"That the decree previously entered by this court on June 11, 1934, was a final decree and finally disposed of all the questions then and now before the court."

It is urged that we are bound by this finding, and, of course, such is the rule if it is a finding of fact, and it has substantial support in the record. To our mind, the construction to be placed upon the decree in question is one of law rather than of fact. We think it is the duty of this court to make a determination as to the finality of the decree and the effect which it had upon the parties before the court. But even if its construction was properly incorporated in a finding of fact, we do not believe it finds substantial support in the record. Our conclusion that the matter of the disposition of funds remaining in the possession of the plaintiff after June 1, 1937, was not considered and was not intended to be determined by the decree of June 11, 1934, finds additional support in a statement made by the court on January 24, 1938, during a hearing on the state's claim, as follows:

"I did not have any doubt but what everybody would come tumbling in to get these refunds, and I did not seriously consider or sufficiently consider this possibility of somebody not coming in and claiming the refund. We were in the midst of the depression, and $5 was a fortune to the people who were entitled to it, and I thought everybody would be in and get it, and so we did not provide for the possibility of this, that it might exist and it might not be called for, but it was not ignored; it was only underestimated. If there was anybody who did not call for it, we thought that he would be somebody who had just a small claim or needed a guardian or something."

We, therefore, are of the opinion that the court not only had jurisdiction to entertain the claim as presented by the state, but that there was nothing in any of its former proceedings, including the decree of June 11, 1934, which precluded it from so doing.

It is also contended by the plaintiff in reliance on the decree of June 11, 1934, that it has made disbursements in excess of the overcharges which it

collected from its subscribers, and, therefore, has an equitable claim to the funds now in its possession. It is not disputed but what plaintiff spent upwards of $2,700,000 in the making of refunds in conformity with the decree of June 11, 1934, and, in addition, some $166,000 has been paid to various parties to the litigation and their attorneys as fees and costs in connection with the same. While it seems to be conceded that plaintiff faithfully complied with the decree in the making of refunds, we do not see how it could hope to avoid the necessary expenses in making such refunds, nor in the payment of costs, which follow the result of litigation. It must not be overlooked that it was responsible for the situation and that the burden incident thereto was necessary in order that it might extricate itself therefrom.

It is also claimed by the plaintiff that in its reliance upon the court decree releasing it from all liability, it compromised a claim in the amount of $550,000 which he had against the city of Chicago because of a franchise tax collected by the city upon the overcharge which plaintiff had collected from its subscribers. On the other hand, it is claimed by the state that by reason of the decree of June 1, 1934, the plaintiff was relieved of interest, on the amount of the overcharge, subsequent to the entry of the decree in the amount of $600,000 and was enabled to earn an additional $300,000 upon the amount of overcharges in plaintiff's possession. It is also urged by the plaintiff that, as the decree of June 11, 1934, authorized it to deduct from any overcharge due a subscriber, any amount which the subscriber might be indebted to it, and as substantially one-third of the amount now in its possession could properly be so offset, it is entitled to such credit. Undoubtedly there is merit in this latter contention, but inasmuch as the decree is to be affirmed on grounds hereinafter assigned, we do not deem it necessary to make such determination.

[6–8] It is argued by the state that the provision in the decree fixing June 1, 1937, as the expiration of the period during which claims might be filed, was merely one of inquiry, rather than of limitation. With this argument we do not agree. That the time fixed during which claims by subscribers were required to be filed was reasonable, is conceded, or at any rate, not disputed. No objection was made to this provision of the decree at the time of its entry and none is made now. What the court said in Phillips Co. v. Grand Trunk W. R. Co. (1915) 236 U. S. 662, 665, 59 L. ed. 774, 35 S. Ct. 444, we regard as pertinent.

"But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law."

Again on the following page, the court said:

"Under such a statute the lapse of time not only bars the remedy but destroys the liability, . . ."

While the court there had under consideration a limitation period fixed by statute, we see no reason why a limitation fixed by the court would not produce the same result. Therefore, the decree, by its terms, on June 1, 1937, released the plaintiff from any liability in so far as its subscribers were concerned. It perhaps becomes important in this connection to determine

the status occupied by plaintiff with reference to its subscribers. We are advised by the defendant that "it is not important to determine whether the telephone company is a trustee or simply a debtor." Whether this is important or not, we think the relation existing was merely that of debtor and creditor. The overcharges in the possession of the plaintiff were not earmarked or separated. Plaintiff was liable for interest on the overcharges and was permitted, by the court's decree, to offset against such overcharges, debts due from the subscribers. Thus, the court and the parties themselves must be held to have treated plaintiff as a mere debtor, as we think it was. If such be the case, the subscribers, at the expiration of the limitation period, were not only without remedy to assert a claim, but the debt owing by the plaintiff was extinguished.

[9, 10] The claim of the state of Illinois is predicated upon the doctrine of bona vacantia. It is admitted that no such doctrine exists, applicable to the situation here, by reason of any statutory provision of the state of Illinois, but it is argued that it was recognized by the common law of England prior to the year 1606, which was the fourth year of James the First. If such be the case, it, no doubt, is the law of Illinois by virtue of Chap. 28, Illinois Rev. Stats. 1927, as follows:

"That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First . . . and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." (Illinois Rev. Stats. 1933, p. 685.)

No case or textbook published prior to that date relative to such doctrine is cited, but it is sought to establish the same by reference to cases decided in England subsequent to that time, which, it seems, may be done, provided of course the principle is clearly established and applicable to the situation to which it is sought to be applied. People ex rel. German Ins. Co. v. Williams (1893) 145 Ill. 573, 33 N. E. 849; Phillippe v. Clevenger (1909) 239 Ill. 117, 87 N. E. 858. The doctrine, so it is argued, is applicable to the instant situation on the theory that the unrefunded money remaining in the possession of plaintiff after June 1, 1937, was personal property without an owner and that by reason thereof, the same passed to the sovereign, the state of Illinois. Of the many English cases cited and discussed, there are none, the facts of which are similar to those of the instant case, but this does not constitute an insurmountable obstacle if the doctrine, as announced, can be made to apply. The earliest case cited is that of Middleton v. Spicer (1783) 1 Brown C. C. 201. There a testator, by his will, directed that his property be sold and the money paid to a charity, which, for reasons not important here to relate, was incapable of taking. There were no next of kin and the contest was between the executors and the Crown. The Chancellor decreed to the effect that the executors held as trustees without possibility of beneficial interest and decreed in favor of the Crown.

Undoubtedly, the leading case upon

the doctrine sought to be invoked is that of Dyke v. Walford (1846) 5 Moore, P. C. C. 434. In fact, in Re Barnett's Trusts (1902) 3 British Ruling Cases, 198, 209, it is stated:

"All the learning on the subject of bona vacantia is to be found in the case of Dyke v. Walford (1846) 5 Moore, P. C. C. 434."

In the Dyke Case, the question at issue was as to the right of the Duchy of Lancaster, on account of a charter from the Crown in 1337, to the personal property of an intestate bastard dying without next of kin. The court decided in her favor, basing its decision on bona vacantia. Among other things, the court said (3 British Ruling Cases, at p. 202):

". . . the origin of the right shows that (if it existed at all), it must have existed from the foundation of the monarchy; and that it is the right of the Crown to bona vacantia,—to property which has no other owner. (P. 495.)"

It will be noted this decision was rendered in 1846, more than 200 years subsequent to the fourth year of James the First, and even at that late date, doubt was expressed as to the existence of such a prerogative in the Crown prior to the time of the decision of Middleton v. Spicer, *supra*. That there was much confusion and uncertainty as to the application of such doctrine, on the situation there existing, is well illustrated by the argument advanced by the various counsellors. The Solicitor General argued as follows:

"Now, can it be said that, in this country, it is the law that bonum vacans should be brought into the treasury? Certainly not, a different rule prevails in England. In the case of Armory v. Delamirie, a chimney-sweep who found a jewel, was held to have a right to retain it against the Crown and everyone else. This shows that the law of England never presumed that the bonum vacans ever belonged to the Lord of the fee or the Crown."

This argument was answered by Parker, Q. C., in the following words:

"The rule in common law is that property must belong to somebody; and where there is no other owner, not where the owner is unknown that is the distinction, it is the property of the Crown."

Parker's argument evidently prevailed as the court defined "the right of the Crown to 'bona vacantia' as a right 'to property which has no other owner.'"

Later in Re Wells (1933) 1 Ch. Div. 29, the court, in discussing the Dyke Case, said:

". . . where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown."

Numerous cases are cited wherein it is claimed the doctrine has been recognized. We think it would serve no useful purpose however, to discuss them. They perhaps, without exception, fall within one or more of the following categories:

"(1) death intestate with no next of kin of person capable of inheriting;

"(2) noncharitable trust with a failure of beneficiaries; or

"(3) corporation dissolved leaving property to which neither stockholders nor creditors were entitled under the English Corporation law."

Many reasons are advanced by plaintiff as to why the doctrine is not here

applicable. We shall not discuss them all, as one good reason is sufficient. Under the state's theory, the only property which could pass to the state was that owned or possessed by the subscribers at the end of the limitation period. The argument of the state, in our opinion, is predicated upon a foundation which is unsound in that the subscribers, at the time when the state made claim, were neither in possession of the owner of any property, or right of claim thereto. Even before the period of limitation expired, they were not, in the true sense, owners of the fund, or of any part thereof, in the possession of the plaintiff by reason of the overcharges which they had paid. They had only a claim against plaintiff for a refund. As heretofore determined, a relation of debtor and creditor existed. For those who failed to make claim in apt time, such relation was terminated. Arguments are presented pro and con that the doctrine of bona vacantia never was recognized as to debts. To our minds, this argument is beside the point for the reason that when the state made claim, there was no longer a debt in existence. Therefore, there was nothing for the state to take.

If, however, we should be in error in our conclusion that the only property interest which the subscriber had was a claim against plaintiff which was extinguished at the expiration of the limitation period, thereby leaving nothing to which the state could succeed, we would yet be compelled to decide against the state's contention on the ground that the common law on which it relies is of such an uncertain and indefinite nature in its scope and limitations that this court would not be justified in proclaiming its existence as a rule of law of Illinois applicable to a situation such as is here presented.

Therefore, the decree of the court below is affirmed.

MICHIGAN PUBLIC UTILITIES COMMISSION

Re Michigan Bell Telephone Company

[T–252–39.1.]

Rates, § 575 — Telephones — Metropolitan area — Tolls — Community of interest.

1. The definition of local telephone service in a metropolitan area requires revision, in order that it may include all telephone service that is actually local in character, where the community of interest between the exchange in the metropolis and the near-by exchanges is such that toll service between them is no longer of minor importance to large groups in the suburban communities, p. 273.

Rates, § 573 — Telephones — Metropolitan exchange areas — Extensions.

2. Enlargement of the present metropolitan telephone exchange area to include adjacent suburban exchanges, in order to lower telephone charges for subscribers who make use of substantial metropolitan toll service, offers no

permanent solution of the metropolitan area telephone problem, in view of probable higher exchange rates and the creation of new problems as to the next group of adjacent exchanges, p. 273.

Rates, § 582 — Telephone — Toll centers — Metropolitan exchange.

3. A metropolitan telephone exchange which covers an area of 270 square miles is too large to have only one toll rate center, p. 274.

Rates, § 541 — Telephones — Metropolitan area — Zones.

4. A plan for elimination of inequities in telephone charges as between subscribers in a metropolitan exchange and subscribers in suburban exchanges provided for (1) enlargement of a metropolitan telephone exchange to include certain suburban exchanges (having a community of interest) on a zone basis, (2) provision for a new type of optional local service in each zone, including all the features of existing local services plus a certain amount of interzone service, (3) subdivision of the metropolitan zone for the application of interzone unit charges, and (4) reduction of charges on calls to near-by areas for suburban subscribers retaining limited zone service, p. 276.

[January 10, 1939.]

INVESTIGATION *of rates and services of a telephone company in a metropolitan area; zoning plan established. See also 25 P.U.R.(N.S.)24.*

By the COMMISSION: This Commission, having had under consideration for some time numerous complaints and petitions of telephone users in Detroit and its suburbs relative to claimed inequitable toll charges for telephone service between locations within that area, early in 1938 caused a survey and study to be made of the situation. Following that an order was issued—April 28, 1938—calling for a hearing to be held in the matter on the 25th of May, 1938. At that hearing a proposed plan was submitted by the Commission's chief telephone engineer which was designed to alleviate the disclosed inequalities existing in the toll rate situation in the Detroit metropolitan area.

Subsequently comments on the proposed plan were submitted by representatives of several municipalities. In addition letters and comments were received from individuals who had an interest in the matter.

Considerable testimony was introduced by the Commission's chief telephone engineer concerning the fundamental difficulties underlying the present rate situation in the Detroit metropolitan area but it may be well to restate briefly the nature and cause of the situation which we are proposing to correct.

The Detroit exchange area comprises some 270 square miles and includes within its boundaries the city of Detroit and the cities of Dearborn, Highland Park, Hamtramck, River Rouge, Ecorse, Lincoln Park, Melvindale, the Grosse Pointe municipalities and certain other communities. The Detroit exchange area is the largest in the world within which local telephone service is furnished without the application of zone charges. In spite

of the fact that the local service area is so large, there are many municipalities adjacent to the exchange boundaries of the Detroit exchange which have a very definite community of interest with areas immediately adjacent to them and located in the Detroit exchange area. Due to the rapid growth in the city of Detroit and in the adjacent areas there exist today many situations where the development overflows corporate and other boundaries to the extent that such boundaries operate as unnatural barriers to the flow of interest back and forth. This situation is particularly true in the furnishing of telephone service.

[1] Attached to this opinion and order is a map labeled Exhibit A which shows the Detroit exchange and the surrounding area included within a radius of approximately 30 miles from the main business section of Detroit. This area covers some 1,500 square miles, has a population in excess of 2,400,000 people, contains over fifty separately incorporated communities, and receives telephone service from 28 different exchanges.

The general plan of furnishing telephone service in this area consists of providing local or intracommunity service within the exchange boundaries and toll service or intercommunity service between the various exchanges. This plan of furnishing telephone service permits of lower local service rates than would otherwise be possible and results, therefore, in a wider development of such local service. It likewise enhances the value of toll service in so far as it fosters growth in the number of telephones in the area through the medium of offering local rates at as low a level as possible, thus providing the maximum number of possible toll connections. This classification of telephone service has proven satisfactory under normal conditions where the exchange area embraces groups having a common interest. Under this arrangement the local services successfully fulfil the major telephone requirements of each community, the toll service being auxiliary and subordinate to the local or exchange services.

In the case of the Detroit metropolitan area, however, it has become increasingly evident that the community of interest between the Detroit exchange and the near-by exchanges is such that the toll service between Detroit and those exchanges is no longer of minor importance to large groups in the suburban communities. It appears from the telephone company's own records that about 89 per cent of the customers in the near-by suburban communities use toll service to Detroit in a single month. Under such a condition the existing division of the telephone service into local and toll classifications is not satisfactory to the majority of the suburban subscribers and it appears that the definition of local service in this area requires revision in order that it may include all telephone service that is actually local in character.

[2] One type of revision that has been urged is the enlargement of the present Detroit exchange area to include the adjacent suburban exchanges. This step would result in a reclassification of the present Detroit suburban calls as local. It would, however, probably necessitate a higher schedule than the one presently applicable in the Detroit exchange. It is obvious that while this arrangement would result

in lower telephone service charges for those subscribers who make substantial use of metropolitan toll service, it would also result in substantially higher charges for the remaining subscribers, most of whom make only nominal use of the metropolitan toll service. The telephone company's data indicate that while as stated before about 89 per cent of the suburban subscribers use toll in a single month, only 37 per cent use over ten calls per month and only 12 per cent use more than one call per day.

To enlarge the present Detroit exchange area to include all the near-by suburban exchanges would more than double its area and would increase the number of stations in the Detroit exchange by only 21,000, or 6 per cent. It is the opinion of the Commission that continued expansion of the Detroit exchange area can only result in increasing costs for Detroit local service; such costs affect not only the suburban customers but also thousands of subscribers in Detroit whose community of interest is entirely within the confines of the present Detroit exchange area.

Furthermore the history of the extension of the Detroit exchange area leads us to the conclusion that the simple extension of boundaries offers no permanent solution of the metropolitan area telephone problem. In spite of the size of the Detroit exchange as presently constituted the problem created by the wide disparity of charges between the local calls within the Detroit exchange and toll calls between the suburban exchanges and the border areas within Detroit still exists. Were the adjacent suburbs taken into the Detroit exchange the situation would be corrected only as far as those suburbs are concerned, but would be created anew and probably in a more aggravated degree for the next group of exchanges that would then be adjacent to Detroit.

[3] The immediate difficulty in the Detroit situation arises from the fact that subscribers located on either side of the Detroit exchange boundary and close to that boundary are required to pay, under the present arrangement, the same toll charges to communicate with each other as apply for calls between the respective suburban exchanges and the furthermost points in Detroit. This situation is due to the fact that all toll calls to and from the Detroit exchange are based on distance measurements to one fixed point.

The general practice throughout the United States in connection with message toll rates between telephone exchanges is to base those rates on the air-line distance between certain fixed points or rate centers, there being one such rate center for each exchange. Generally the post office locations are used as the rate centers. This practice, besides being simple to administer, generally creates no hardship as long as the exchange areas are not too large and the development centers around the post office. Where the exchange areas become large, as is the case in most metropolitan areas around the large cities in the country, it has been found expedient to establish several toll rate centers in order to avoid creating undesirable toll rate situations. While this latter treatment does not entirely eliminate the difficulty it does considerably ameliorate it. It is our opinion that the Detroit exchange which covers an area of 270 square

miles is now too large to have only one toll rate center.

The existing practice of quoting toll rates between Detroit and its suburbs appearing inequitable, the Commission on May 25, 1938, brought on for hearing upon its own motion the matter of a new plan for telephone service in the Detroit metropolitan area. Approximately 40 municipalities in the area were served with the Commission's hearing notice, dated April 28, 1938, and 11 municipalities were represented at the May 25, 1938, hearing as follows: Berkley, Birmingham, Royal Oak, Detroit, East Detroit, River Rouge, Plymouth, Ferndale, St. Clair Shores, Center Line, and Warren township.

At the conclusion of the hearing the Commission requested the various interested municipalities and individuals to submit in writing modifications or improvements or other suggestions with respect to the proposed plan for the Commission's benefit and information. Subsequently, the following municipalities filed suggested modifications and comments: City of Berkley, city of Detroit, city of East Detroit, city of Birmingham, city of Plymouth, city of Center Line, and township of Warren. Summarized, the modifications suggested and the comments of these municipalities were substantially as follows:

1. Rather than introduce a plan of zoning the Detroit exchange as related to its suburban exchanges, a flat 5-cent reduction per call in the existing toll rate schedule would be more easily understood and would benefit more people than the proposed plan.

2. That the plan proposed be adopted but that it be so adjusted as to permit a reduction in the message toll rate between downtown Detroit and the Detroit suburbs without the requirement that the subscriber, to avail himself of this reduced toll rate, subscribe to extended area service at an increased monthly rate.

The Commission has given careful consideration to the proposed modifications submitted by the interested municipalities and it appears that abandonment of the zoning plan substantially as proposed is not advisable, for the reason that the zoning proposal was offered as a means of softening the effects of boundary lines which could be accomplished practically in no other manner. A flat toll rate reduction within the area would not remedy the inequalities that exist because of boundary lines.

The plan proposed was designed, as stated at the hearing, to elicit comment and criticism and to establish a working basis for the solution of the problem. As a result of the Commission's review of the comments submitted by the various parties in interest and as the result of further studies on the part of the Commission's engineering department and the telephone company's engineers a second plan has been evolved, which, while it does not meet in all respects the criticisms and suggestions offered by the various parties, represents an improvement over the original plan in that the savings to the public would be more than doubled and also in that the plan is considerably simplified over the original one.

As has been stated before, this proceeding arises from complaints on the part of subscribers and municipalities in the Detroit metropolitan area for re-

lief from existing inequities in charges as between subscribers located in the Detroit exchange and subscribers located in suburban exchanges immediately surrounding Detroit. No inquiry has been directed toward the adequacy or inadequacy of the telephone company's revenues, it being sufficient for our purpose in this proceeding to recognize that substantial inequities have developed and that it is in the interest of all parties, both the public and the utility, that such inequities be removed as rapidly as possible. Furthermore, it is the opinion of this Commission that the utility should in the interest of improving its subscriber relations, be prepared to make some contribution toward the solution of this problem by way of improving and expanding the service to the public even though such action by the company entails a reduction in its revenues.

As has been stated previously, the Detroit exchange is now the largest metropolitan area exchange in the United States wherein local service is offered without the application of zone charges. There are metropolitan area exchanges in the country larger than Detroit but they are all on a zoned basis. A study has been made of the various types of metropolitan area telephone plans in use and it is our conclusion that the plan which we propose for Detroit embodies the best features of the various types of plans in use throughout the United States, the one which will be best suited to this area, which will relieve the inequities complained of, result in substantial savings to the communities concerned, and one which will, in our opinion, establish principles for the orderly and economical expansion of the telephone service in this dynamic area for many years to come.

[4] As a result of our studies the Detroit exchange is to be enlarged to include the following ten suburban exchanges on a zoned basis: Birmingham, Center Line, Farmington, Livonia, Roseville, Royal Oak, Southfield (new), Trenton, Wayne, and Wyandotte. Those exchanges were selected for inclusion in the new enlarged Detroit district exchange because of their proximity to Detroit, most of them being contiguous, and because of their high community of interest, as indicated by the high calling rate per average subscriber, with the Detroit exchange.

The first feature of relief under this order provides that a new type of optional local service be offered in each zone of the Detroit district exchange, such service including all the features of the existing local service plus a certain amount of interzone service—the amount and character of the enlarged service varying with the zone and the classification of the extended area service elected. This new extended area service, which will make available to residence subscribers in the suburban exchanges enlarged flat rate calling areas many times as large as available today, and more nearly comparable with the extensive service available in the Detroit exchange today, is to be offered at rates which will permit substantial savings in charges to all the suburban subscribers who have a high community of interest with Detroit. A comparison of the size of the present local calling area and the new enlarged flat rate calling area for the residence extended area subscribers is shown on attached Exhibit B. The rates for ex-

tended area service will be coördinated in all zones of the Detroit district exchange so that all suburbs will be accorded equitable treatment, no suburb will be discriminated against, and no suburb will be unduly favored.

Also a second form of relief is provided whereby the Detroit zone of the Detroit district exchange will be subdivided into seven areas for the application of interzone unit charges, the areas contiguous to a suburb in each case to be included in the flat rate calling area for the residence extended area service subscribers in that suburb. For local interzone calls between the suburb and Detroit zone areas beyond the contiguous areas, the charges will depend upon the particular area called and will be graded in unit steps as the distances between the areas increase, the charges being in practically all cases less than they are today, although in the case of a small percentage of calls, between areas far removed, the charges may be slightly higher than they are now. On the basis of our studies it appears that the charges on approximately 70 per cent of all the suburban-Detroit calls will be reduced as a result of the introduction of the extended area service. The zoning divisions will have no application to or effect upon local calls which are originated and completed within the present Detroit exchange area. Local calls and service wholly within the present Detroit exchange will be continued as presently effective, and the Detroit zoning will provide means only for the facilitation of calls and service to and from the suburbs.

As a third form of relief for suburban subscribers who make calls to Detroit only occasionally and who will wish to retain their existing limited zone service, the charges on calls to the near-by areas in Detroit will be reduced. This reduction will be given automatically to all subscribers, no action on their part being necessary to obtain this benefit. Studies indicate that for such limited zone service subscribers about 30 per cent of their Detroit calls will be automatically reduced, the abatement in charges on some calls being as high as 75 per cent.

A study of the local rates which are now in effect in the various suburban exchanges which are to be included in the district exchange indicates that the rates are not comparable in the various zones, certain zones having higher rates than appears warranted by the size of the zone, and other zones having lower rates than seems warranted by the size of the zone. It is desirable in order that discrimination between communities be avoided, that all the local rates, limited area as well as extended area, within the district exchange be coördinated with a well-balanced system of charges reflecting the extent and scope of the service in the various zones. But since this proceeding has been limited to the elimination of inequities in charges for calls between Detroit and its suburban exchanges, no revision in the existing local limited area rates will be made at this time.

The plan proposed for the Detroit district exchange should correct the complained-of inequities caused by the existing boundaries. Within the proposed Detroit district exchange the existing exchange boundaries in effect disappear, the communication across them can be carried on as easily and at

no greater charge than for comparable service within the existing exchange boundaries. The charges for calls within this district exchange are graded in steps from the local one-unit call, which may be flat rate, up to the higher value calls which may be as high as five units as distances increase.

It is similarly proposed to grade the charges for calls between the Detroit exchange and other suburban exchanges in the Detroit metropolitan area. This will avoid any abrupt change in charges at the district exchange boundary and will result in a well-balanced system of charges throughout the entire Detroit metropolitan area. A toll rate center will be established at the approximate geographical center of the central office locations of each of the seven area subdivisions of the Detroit zone. These toll rate centers will be used for the determination of intrastate toll message rates within the Detroit metropolitan area. All calls which are within 40 miles of a Detroit area toll center will take the standard intrastate toll rate based on the air-line measurement between the rate centers. Rates for calls to points beyond 40 miles of each Detroit area rate center, will be the same as at present.

This establishment of seven toll rate centers for the Detroit zone in the stead of the existing single center will result in substantial savings to the suburban exchanges, the amount of the reduction to any suburban exchange depending upon the distribution of the traffic terminating in the Detroit area.

Our studies indicate that, for the suburban exchanges beyond the Detroit exchange, the exchanges closest to Detroit would receive the greatest proportional benefit, and those farther removed would be affected to a correspondingly lesser degree. This is because the closer the exchanges are to Detroit the greater the proportion of traffic to the nearer side of the city and the greater the proportion of traffic on which deduction would occur.

The aggregate savings to the telephone subscribers in the metropolitan area as a result of the adoption of the plan is anticipated to be $233,000 annually, which estimate is based upon present traffic volume. The total benefit to the subscribers from the introduction of the plan is considerably greater than represented by the saving in charges. The introduction of the extended area service and the enlargement of the flat rate calling areas for each of the suburban zones, as indicated in attached Exhibit B, has great potential value to the subscribers in so far as it will permit an increase in traffic at no increased cost to them. Experience with such plans, where toll charges between areas have been eliminated, indicates that the increase in traffic and the consequent benefits to the public are substantial.

The Commission, in approving the proposed plan modified as indicated above, concedes that much included therein is experimental and if it appears after a reasonable period of actual experience that certain phases should be modified or repealed, or that additions should be made, such will be done. Further, it is not a part of the Commission's intention or plan to "zone" or "district" the present De-

troit exchange for the purpose of in the future assessing increased charges for messages from one section of the present Detroit exchange to another.

The Commission, being fully advised and informed relative to the matters now before it, after due deliberation and consideration, is of the opinion that the adoption of the plan would be in the furtherance of the public's convenience and necessity; that it would go far to ameliorate the conditions complained about and would result in substantial savings to the telephone users in the Detroit metropolitan area consisting of 28 existing exchanges serving some 50 municipalities and adjacent territory in Monroe, Oakland, Washtenaw, and Wayne counties, Michigan, having a combined population of approximately 2,400,000 and 385,000 telephones.

Now, therefore, it is hereby *ordered:* The Michigan Bell Telephone Company shall prepare and submit for filing and approval in accordance with the tariff rules of this Commission, tariff rules and rates to be effective as soon as reasonably possible, to provide for the following:

1. Establish, as illustrated on the map annexed hereto as Exhibit A a "Detroit district exchange" to include the present Detroit exchange and the following ten suburban exchanges: Birminghan, Center Line, Farmington, Livonia, Roseville, Royal Oak, Southfield (new), Trenton, Wayne and Wyandotte.

2. Establish seven zones within the present Detroit exchange, substantially as shown on Exhibit A annexed hereto. The table below indicates the central offices included in the respective zones:

	Map Symbol	Central Offices
Zone 1	M	Madison, Trinity—1 & 2
	N	Columbia, Temple—1 & 2, Terrace—2
	O	Cadillac, Randolph, Cherry, Clifford, (Elmhurst)
	P	Fitzroy
Zone 2	S	Pingree, Arlington
	T	Lenox, Murray, Drexel
	Q	Plaza, Ivanhoe, Olive
	U	Niagara, Tuxedo—2
Zone 3	K	Townsend—5, 6, 7, 8
	R	Hubbard, Slocum
Zone 4	F	Tennyson—5
	I	University—1, 2, & 3
	G	Vermont—5 & 6
	H	Hogarth, Davison, Northlawn
Zone 5	E	Redford
Zone 6	A	Atlantic
	B	Dearborn
	C	Vinewood—1 & 2
	D	Oregon
Zone 7	J	Tyler—4, 5, 6, & 7
	L	Lafayette

3. Within the Detroit district exchange, as herein defined, establish message unit charges applying to interzone, intradistrict exchange messages, the message units per initial and overtime period, from message rate and flat rate business and residence stations, and from public and semi-public pay stations to be as shown in the following table:

TABLE I

Number of Message Units Per Five-Minute Initial Period

	Birmingham	Center Line	Farmington	Southfield	Livonia	Roseville	Royal Oak	Trenton	Wayne	Wyandotte
Birmingham	–	2	2	1	3	3	1	5	4	4
Center Line	2	–	4	2	4	1	1	5	4	4
Farmington	2	4	–	1	1	4	3	5	3	4
Southfield	1	2	1	–	2	3	1	4	3	4
Livonia	3	4	1	2	–	5	3	3	1	3
Roseville	3	1	4	3	5	–	2	5	5	4
Royal Oak	1	1	3	1	3	2	–	5	4	4
Trenton	5	5	5	4	3	5	5	–	3	1
Wayne	4	4	3	3	1	5	4	3	–	3
Wyandotte	4	4	4	4	3	4	4	1	3	–
Detroit—										
Zone 1	3	2	4	3	3	2	2	3	3	2
Zone 2	3	1	4	3	4	1	2	4	4	3
Zone 3	2	1	3	2	3	1	1	4	3	3
Zone 4	2	2	2	1	2	2	1	3	2	2
Zone 5	2	3	1	1	1	3	2	3	2	2
Zone 6	3	3	2	2	1	3	2	2	1	1
Zone 7	3	2	3	2	2	2	2	3	2	2

An additional message unit shall apply for each overtime period of conversation in excess of the initial period. The number of minutes of overtime for each additional unit shall be as follows:

When the number of units per initial period is	Minutes of overtime per additional unit
1 message unit	5 minutes
2 " units	3 "
3 " "	2 "
4 " "	2 "
5 " "	1 minute

4. (a) Within the Detroit district exchange, as herein defined, establish optional extended area residence one- and two-party line services at the rates shown below, offering unlimited intrazone and unlimited one-unit interzone service, other interzone service at 4 cents per message unit:

TABLE II

	1-Party Residence	2-Party Residence
Birmingham	$3.50	$3.00
Center Line	4.00	3.50
Farmington	3.25	2.75
Southfield	3.75	3.25
Livonia	3.75	3.25
Roseville	4.00	3.50
Royal Oak	4.00	3.50
Trenton	3.25	2.75
Wayne	3.50	3.00
Wyandotte	3.50	3.00

(b) Within the Detroit district exchange, as herein defined, establish optional extended area individual line business service at the rates shown below, offering unlimited intrazone service, and interzone service at 4 cents per message unit:

TABLE III

	1-Party Business	P. B. X. Trunk
Birmingham	$5.00	$5.90
Center Line	4.50	5.30
Farmington	4.50	5.30
Southfield	4.50	5.30
Livonia	4.50	5.30
Roseville	4.75	5.60
Royal Oak	6.00	7.10
Trenton	4.75	5.60
Wayne	4.75	5.60
Wyandotte	5.00	5.90

(c) For subscribers electing to retain their present limited area local services the charge for interzone calls shall be 5 cents per message unit.

(d) Within the seven Detroit zones, as herein defined, optional individual line extended area message rate service at an additional monthly charge (over the present rate) of 50 cents per line in the case of business and private branch exchange trunk lines, and 25 cents per line in the case of residence lines, shall be made available and the local message allowance prescribed by the present tariffs changed or converted to an equal number of "message units" expendable for both local calls and interzone suburban calls; monthly use in excess of the prescribed allowance to be charged for at 4 cents per unit.

(e) Within the seven Detroit zones, optional flat rate individual line extended area residence service, at an additional monthly charge (over the present rate) of 25 cents per line, shall be made available, permitting interzone suburban calls to be made at the rate of 4 cents per "message unit."

(f) Unlimited area service and extended area service as provided for by parts (a), (b), (c), (d), and (e) above, shall not be furnished on the same premises nor on different premises if the services are provided on the basis of combined operations.

5. A toll rate center shall be established for each of the seven areas of the Detroit zone. These centers shall be used for measuring toll rate mileages to all points beyond the district exchange and within a radius of 40 miles. For calls beyond 40 miles of a particular Detroit toll rate center, the rates shall be based on the standard system of block and section mileage measurements using the present Detroit toll rate center.

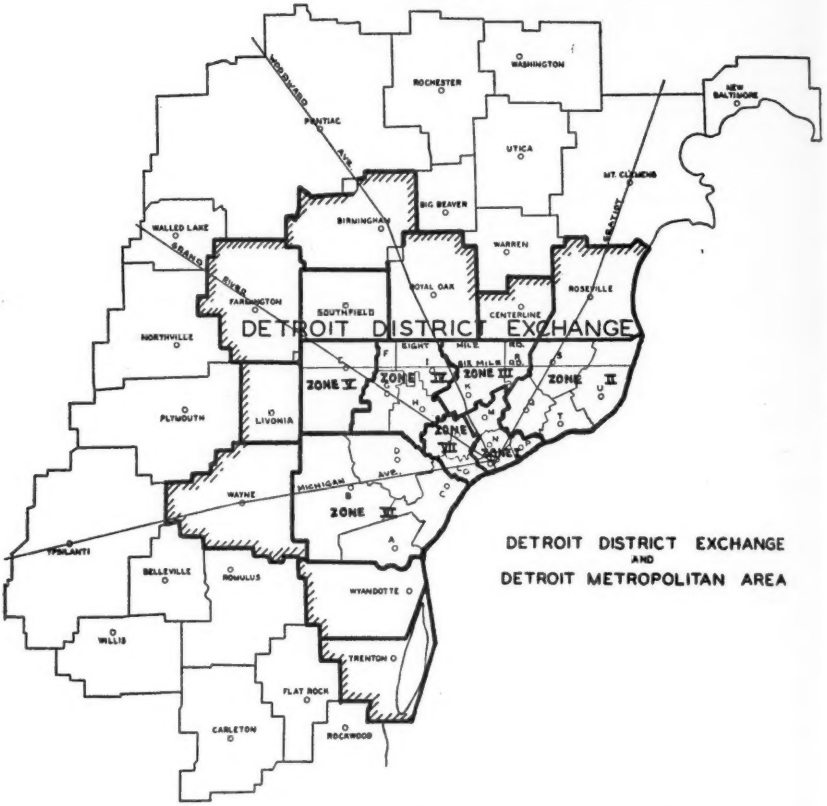
6. Establish, as indicated in part (1) above, the Southfield (or some other suitable name to be later selected) zone to be formed in substantially the manner illustrated by the area indicated "Southfield" on the map annexed hereto as Exhibit A, the rates and charges for intrazone service, and the precise boundaries, to be fixed and approved by a further order.

7. Eliminate, in a manner that will work the least hardship, all "common" territory between exchanges within the metropolitan area, as above defined, within a reasonable period.

8. Provision (6) of the order of October 27, 1937, in the matter of Rosedale Gardens (now Livonia) relating to existing Detroit exchange subscribers permitting said Detroit subscribers within the Livonia zone to retain, at their option, Detroit service without the application of exchange line mileage charges, is hereby revoked and rescinded, provided, however, ample opportunity shall be given to said subscribers to indicate the type of available service that they may in the future desire.

It is *further ordered*, that the Michi-

EXHIBIT A



DETROIT CENTRAL OFFICE LOCATION GUIDE

Symbol	Building Location	Central Offices
A	1358 State St., Lincoln Pk.	Atlantic
B	1034 Monroe St., Dearborn	Dearborn
C	7440 W. Fort St.	Vinewood—1 & 2
D	12911 Ford Road	Oregon
E	21543 Grand River Ave.	Redford
F	Grand River and Greenfield	Tennyson—5
G	Grand River and Greenfield	Vermont—5 & 6
H	10515 Northlawn Ave.	Hogarth, Davison, Northlawn
I	7000 W. Six Mile Road	University—1, 2, & 3
J	6155 Grand River Ave.	Tyler—4, 5, 6, & 7
K	80 Highland Ave., H. P.	Townsend—5, 6, 7, & 8
L	2166 Hubbard Ave.	Lafayette
M	105 E. Bethune Ave.	Madison, Trinity—1 & 2
N	52 Seldon Ave.	Columbia, Temple—1 & 2, Terrace—2
O	1365 Cass Ave.	Cadillac, Randolph, Cherry, Clifford (Elmhurst)
P	3129 E. Congress St.	Fitzroy
Q	7800 E. Ferry Ave.	Plaza, Ivanhoe, Olive
R	7800 E. Ferry Ave.	Hubbard, Slocum
S	13635 Greiner Ave.	Pingree, Arlington
T	1660 Hillger Ave.	Lenox, Murray, Drexel
U	17045 Mack Ave.	Niagara, Tuxedo—1 & 2

EXHIBIT B

INCREASED FLAT RATE CALLING AREA
WITH
RESIDENCE EXTENDED AREA SERVICE—SUBURBAN ZONES

Flat Rate Calling Area for Subscribers to Residence Extended Area Service in Suburban Zones

Suburban Zone	Stations in Local Zone Area	Stations	Detroit Zones	Additional Suburban Zones
Birmingham	4,550	12,000	..	Royal Oak, Southfield
Center Line	325	117,000	2 & 3	Roseville, Royal Oak
Farmington	800	8,000	5	Livonia, Southfield
Livonia	200	34,000	5 & 6	Farmington, Wayne
Roseville	1,625	109,000	2 & 3	Center Line
Royal Oak	7,450	100,000	3 & 4	Birmingham, Center Line, Southfield
Southfield	250	70,000	4 & 5	Farmington, Royal Oak, Birmingham
Trenton	1,150	5,000	..	Wyandotte
Wayne	1,475	26,000	6	Livonia
Wyandotte	3,350	29,000	6	Trenton

Central Offices in Detroit Zones:

Zone 1—Cadillac, Cherry, Clifford, Columbia, Elmhurst, Fitzroy, Madison, Randolph, Temple, Terrace, Trinity

Zone 2—Arlington, Drexel, Ivanhoe, Lenox, Murray, Niagara, Olive, Pingree, Plaza, Tuxedo

Zone 3—Hubbard, Slocum, Townsend

Zone 4—Davison, Hogarth, Northlawn, Tennyson, University, Vermont

Zone 5—Redford

Zone 6—Atlantic, Dearborn, Oregon, Vinewood

Zone 7—Tyler, Lafayette

gan Bell Telephone Company prepare and submit, pursuant to the provisions of the statutes, after due publication, proposed revisions involving increases in certain rates and charges for intrazone services in the following district exchange zones: Birmingham, Royal Oak, Farmington, Trenton, and Wayne.

Upon the filing of such proposals the Commission will hear and determine the issue and will at the same time and place, upon its own motion, consider reductions in certain rates and charges for intrazone services in the following district exchange zones: Center Line, Birmingham, Roseville, Royal Oak, and Wyandotte.

All of the above revisions appear to be necessary to remove discrimination that will otherwise exist as between various classes of subscribers within the Detroit district exchange.

The Commission retains full and complete jurisdiction in the matter, and reserves the right to issue such further orders as may be in the future necessary herein.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION

Re Spring Valley Water Works & Supply Company

[Case No. 9618.]

Rates, § 48 — Hydrant service under public contract — Jurisdiction of Commission.

1. The Commission can fix rates for hydrant service for public use when no contract exists therefor between the water utility and the municipality, p. 286.

Service, § 157 — Automatic renewal of public contract — Water — Rates.

2. A contract between a municipality and a water utility whereby the latter is to supply water for public use for a specified period and at a stated rate is not automatically renewed even though service is continued after the expiration of the contract period, p. 286.

[January 31, 1939.]

PROCEEDING *to investigate accounts, books, and records of a water company to determine original cost of property; motion by village to enlarge investigation to include reasonableness of rates paid by the village for hydrant service granted.*

APPEARANCES: Gay H. Brown, Counsel (by Raymond J. McVeigh, Principal Attorney), for the Public Service Commission; Arthur H. Pratt, Chief Hydraulic Engineer, for the Public Service Commission; DeForest,

Cullom and Elder (by Oliver H. Payne and Randall J. LeBoeuf, Jr.), New York City, Attorneys for Spring Valley Water Works & Supply Company; Charles J. Alfke, Spring Valley, Vice President of Spring Valley Water Works & Supply Company; Emile J. Fricker, Spring Valley, Assistant to President, Spring Valley Water Works & Supply Company; Henry V. Stebbins, Sparkill, Attorney for the village of Piermont; Larkin, Rathbone and Perry (by Stephen C. Millett, Jr.), New York city, Attorneys for Robert Gair Company, Inc.

VAN NAMEE, Commissioner: This Commission by an order dated September 8, 1938, instituted an investigation into the accounts, books, and records of the Spring Valley Water Works and Supply Company to determine the original cost of the property.

The first hearing was held on Wednesday, October 5, 1938, before me at the New York office of the Commission. At this hearing Henry v. Stebbins, attorney for the village of Piermont, made a motion to enlarge the investigation to include the reasonableness of the rates paid by the village of Piermont to the water company for hydrant service.

Counsel for the water company alleged that the village of Piermont was receiving hydrant service pursuant to the terms of a contract and therefore this Commission had no jurisdiction over the rates charged the village for hydrant service.

Further hearings were held on October 24 and November 17, 1938, testimony taken and arguments of counsel heard. All the testimony and arguments of counsel bear on the question whether there was a contract in existence between the water company and the village.

Briefs were filed by both parties. The brief for the village of Piermont was received on January 24, 1939.

History of Contractual Relationship

Originally a contract for a term of five years dated September 15, 1911, was executed by representatives of the village and the water company. Under the terms of this contract the village agreed to pay the company an annual rental of $30 for each hydrant. At the end of the 5-year period this contract was not renewed, but the village continued to pay the rate specified in the contract up until September, 1923.

On September 30, 1923, a new contract was executed which provided, among other things:

"Now, therefore, in consideration of the water company maintaining the said hydrants, the town agrees to pay the water company at the rate of $45 per hydrant annually from October 1, 1923, to and including the 30th day of September, 1924."

The village continued paying the company the $45 rate specified in this contract, the last payment being made on May 27, 1938, for the quarter bill as of March 1, 1938.

On May 31, 1938, the board of trustees of the village adopted a resolution which stated that the village was paying too high an amount for the hydrant service and resolved that the matter of hydrant rates be referred to the Public Service Commission to determine a fair and reasonable rate.

A copy of this resolution was re-

ceived by this Commission on July 19, 1938.

Contentions of Counsel

Counsel for the company contended that by the conduct of the parties the contract executed September, 1923, was automatically renewed from year to year and further that inasmuch as the company was not notified of the intention of the village to revoke the contract until the hearing held before this Commission on October 5, 1938, the contract is in full force and effect until September 30, 1939.

Counsel for the village contended that the written contract of September 30, 1923, expired on September 30, 1924, and that the company never had a written contract with the village after this date.

Discussion

[1] Since the decision of the court of appeals in New York v. Maltbie (1937) 274 N. Y. 90, 21 P.U.R. (N.S.) 446, 8 N. E. (2d) 289, there can be no question that where there is in existence a contract between a municipality and a waterworks company for water for public use, the Public Service Commission is without authority to fix a rate therefor.

Conversely, there can be no question since the decision in the aforementioned case that the Public Service Commission has power to fix rates for water supplied to municipalities for public uses, where there is no contract in existence. The question to be decided on the facts presented in the instant case is whether or not there is a contract in existence between the village of Piermont and the water company before coming to any conclusion on counsel's motion to enlarge this proceeding.

[2] An examination of the contract in question discloses an agreement for the payment of a definite sum of money for a definite service for a definite period, the period being "from October 1, 1923, to and including the 30th day of September, 1924."

Nowhere in the contract was I able to find a word concerning the renewal of the contract for more than the definite period, could I find a word concerning the duty of the village to notify the company that the contract would be terminated at the end of the definite period.

Counsel for the company contends that the contract was automatically renewed from year to year. The automatic renewal doctrine applies to real estate transactions and in some instances has been carried over to contracts of employment for a definite time where the evidence shows that the services have been continued after the expiration of the time, without objection.

In Chase v. Second Avenue R. Co. (1884) 97 N. Y. 384, the court wrote at p. 389:

"A tenant of real estate, permitted to hold over after the expiration of his tenancy, may hold for another year upon the same terms. The landlord has his option to treat the tenant as a trespasser or as a tenant for another year. But if he takes rent, or otherwise assents to the holding over, then the tenant has the rights of a tenant for another year. Schuyler v. Smith (1873) 51 N. Y. 309. These are technical rules applicable to real estate, which have never been applied to per-

sonal property, and so it was held in Chamberlain v. Pratt (1865) 33 N. Y. 47. To the reasoning of that case nothing needs to be added. By using the cars after the expiration of the first term of two years, the plaintiff acquired no new rights. It was always in the power of the defendant to put an end to his occupancy of its cars at any time."

Again, in a recent case before the appellate division, fourth department, decided on March 9, 1938, Foster v. White, 253 App. Div. 448, 451, 3 N. Y. Supp. (2d) 456, the court quoted with approval this doctrine:

"It is doubtless true, as claimed by plaintiffs, that contracts, other than leases, do not automatically renew themselves from year to year. Chase v. Second Avenue R. Co. (1884) 97 N. Y. 384."

There are a great number of cases in the reports where contracts between water companies and municipalities have expired and the companies continue serving the municipalities after such expiration. When a dispute arose as to the amount of payment the company in each case sued on the theory of implied contract. See Port Jervis Water Works Co. v. Port Jervis (1896) 151 N. Y. 111, 45 N. E. 388; Staten Island Water Supply Co. v. New York (1911) 144 App. Div. 318, 128 N. Y. Supp. 1028; Marlborough Water Works Co. v. Marlborough (1914) 163 App. Div. 159, 148 N. Y. Supp. 374; Commonwealth Water Co. v. Castleton (1920) 192 App. Div. 697, 183 N. Y. Supp. 753.

In New York Inter-Urban Water Co. v. Mount Vernon (1918) 185 App. Div. 305, 307, 173 N. Y. Supp. 38, the court, in discussing the renewal of a contract confined by statute to a 10-year term, stated:

"The contract was statutory, reduced to writing, made under seal, and, as I have said, limited by the statute to ten years. The fact that for a time after the statutory and express expiration of such contract the practical dealings of the parties with respect to reimbursement continued in accord with a provision of the contract, could not perforce extend the contract or that provision so as to constitute a continuing legal obligation upon the defendant with respect to the claims in suit. 13 C. J. 626; Hopedale Machine Co. v. Entwistle (1882) 133 Mass. 443. To hold the contrary is also to hold that the statutory term, at least with respect to such provision, can be nullified by the parties, and that a provision of a contract that must expire in 1908 can thus be continued as an obligation applicable to claims resisted by the defendant that arose first in December, 1914, and extended until October, 1916, because of a practice only for a period that intervened December 7, 1908, and September 15, 1914."

Counsel for the company in his brief discusses Marlborough Water Works Co. v. Marlborough, *supra,* and states that the court in that case implied a contract at rates stated in a previous contract.

In that case, the water company sued the village for services rendered and collected an amount of money due for the services rendered. There was no question in that case involving the automatic renewal of contracts. The case merely held (163 App. Div. at p. 161):

". . . we are of the opinion that *the facts* disclosed warranted a holding that there was an implied contract for the payment of the amount claimed, which *is conceded* to have been the amount paid on previous contracts." (Italics supplied.)

Counsel to the company in his brief cites many authorities. I have failed to find one case which holds that a contract made for a year between a water company and a municipality automatically renewed itself at the expiration of the year.

Conclusion

I hold that the contract executed September, 1923, expired on September 30, 1924, and was not automatically renewed even though service was continued to the village by the water company.

The motion of the counsel for the village of Piermont to enlarge the investigation to include the reasonableness of the rates paid by the village for hydrant service should be granted, but the order in this proceeding need not be amended and expanded until the submission in evidence of the original cost and existing depreciation of the company's property now in progress has been determined.

At that time it can be determined whether the proceeding should be expanded to include an investigation of the general rates and charges of the company or be confined to an investigation of the reasonableness of the hydrant charges alone.

UNITED STATES SUPREME COURT

Frank Eichholz

v.

Public Service Commission of Missouri et al.

[No. 367.]

(— U. S. —, 83 L. ed. —, 59 S. Ct. 532.)

Appeal and review, § 9 — Right to appeal — Denial of injunction — Finality of decree.

1. The Supreme Court has jurisdiction of a direct appeal from that part of a decree denying a permanent injunction, even though the lower court has adjudged the defendants entitled to recover on a counterclaim and appointed a special master to take the necessary accounting, which part of the decree is not a final one, p. 290.

Interstate commerce, § 5 — Powers of state — Regulation of highway traffic — Effect of Federal statute.

2. The authority of a state Commission to take appropriate action under state law to enforce reasonable regulations of traffic upon the state highways was not superseded by enactment of the Federal Motor Carrier Act with

respect to a motor carrier whose application to the Interstate Commerce Commission under the Federal statute had not been acted upon, p. 292.

Interstate commerce, § 49 — Powers of state — Certificates for intrastate motor transportation.

3. The validity of the requirement by a state of a certificate of public convenience and necessity when an interstate motor carrier chooses to carry property as an intrastate carrier, to promote the proper and safe use of the state highways, is not open to question, p. 292.

Interstate commerce, § 39 — Restrictions by state — Interstate carriers — Intrastate operations.

4. A rule of a state regulatory Commission prohibiting authorized interstate motor carriers from engaging in intrastate transportation, being designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic, does not on its face impose any improper burden upon interstate commerce, p. 292.

Interstate commerce, § 48 — State regulation — Interstate motor carriers.

5. The fact that the hauling of merchandise by an interstate motor carrier over a state line and back again to its intended destination in the state of origin is actually interstate transportation does not require the conclusion that the action of a state in prohibiting such transportation without a certificate of convenience and necessity for intrastate traffic is invalid, p. 293.

Interstate commerce, § 4 — Powers of state — Absence of congressional action.

6. A state is free to act in order to protect its legitimate interests even though interstate commerce is directly affected, in the absence of the exercise of Federal authority and in the light of local exigencies, p. 293.

Interstate commerce, § 9 — Restrictions by state — Interstate motor carriers — Subterfuges.

7. Prohibition by a state of the use of an interstate motor carrier permit to cover hauling across a state line and back, not in good faith but as a subterfuge to evade the state's requirement as to intrastate commerce, and application of a Commission's rule prohibiting such hauls in the absence of an intrastate certificate, is not an unwarrantable intrusion into the Federal field or the subjection of interstate commerce to unlawful restraint, p. 293.

Interstate commerce, § 53 — Powers of state Commission — Revocation of interstate permit — Violation of rules.

8. A state Commission which has granted an interstate permit to a motor carrier is entitled to enforce its rule against intrastate transportation by such a carrier by revoking the permit for breach of the condition upon which it was issued and accepted by the carrier, p. 293.

[February 27, 1939.]

APPEAL *from decree of District Court of the United States for the Western District of Missouri holding valid an order of the Missouri Commission revoking the permit of an interstate motor carrier, and denying a permanent injunction restraining the Commission and state officers from prosecuting suits against the carrier; affirmed. For lower court decision see 23 F. Supp. 587, 26 P.U.R.(N.S.) 445.*

APPEARANCES: Smith B. Atwood and D. D. McDonald, both of Jefferson City, Missouri, argued the cause for appellant; Daniel C. Rogers and James H. Linton, both of Jefferson City, Missouri, argued the cause for appellees.

Mr. Chief Justice HUGHES delivered the opinion of the court: This is an appeal from a decree of the district court, composed of three judges, holding valid an order of the Public Service Commission of Missouri which revoked appellant's permit as an interstate carrier, and denying a permanent injunction restraining the Commission and certain state officers from prosecuting suits against appellant for using the highways of the state in the transportation of property for hire in interstate commerce. (1938) 23 F. Supp. 587, 26 P.U.R.(N.S.) 445.

[1] By a supplementary answer, the Public Service Commission pleaded a counterclaim for fees alleged to be due to the state for the use of its highways since the granting of the restraining order which was issued on the institution of the suit. The district court adjudged the defendants entitled to recover on the counterclaim and appointed a special master to take the necessary accounting. As the decree is not a final one so far as the counterclaim is concerned, the appellees move to dismiss the appeal. The motion is denied. The decree denied a permanent injunction and this court has jurisdiction of a direct appeal from that part of the decree by virtue of the express provision of the statute. Judicial Code, § 266, 28 USCA § 380. Compare Missouri Pub. Service Commission v. Brashear Freight Lines (1939) — U. S. —, 83 L. ed. —, 59 S. Ct. 480. See Smith v. Wilson (1927) 273 U. S. 388, 390, 71 L. ed. 699, 700, 47 S. Ct. 385; Stratton v. St. Louis S. W. R. Co. (1930) 282 U. S. 10, 14, 75 L. ed. 135, 137, 51 S. Ct. 8.

Since 1931 appellant, Frank Eichholz, has operated freight trucks in interstate commerce between the states of Missouri, Iowa, and Kansas and has maintained terminal facilities in St. Louis, Missouri, Kansas City, Kansas, and other places in Kansas and Iowa. Prior to the passage of the Federal Motor Carrier Act of [August 9] 1935 (49 USCA § 301 et seq.), he obtained a permit from the Public Service Commission of Missouri "to operate as a freight carrying motor carrier over an irregular route" between points in Missouri and points beyond that state, "exclusively in interstate commerce." He did not seek or obtain from the Commission an intrastate permit.

On the passage of the Federal act, appellant applied for a permit from the Interstate Commerce Commission and that application was still pending at the time of the hearing below and argument here.

When the state permit was granted, and thereafter, there was in force Rule No. 44 of the Public Service Commission which provided as follows:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the state of Missouri. If such interstate carrier accepts within Missouri a passenger

whose destination is beyond the limits of the state of Missouri, such passenger shall not be permitted to terminate his trip within the state of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the state of Missouri such property shall not be terminated within the state of Missouri."

In December, 1936, after hearing, the Commission revoked appellant's permit, holding this rule to have been violated. Its decision was based upon a finding that appellant had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri, and destined to Kansas City, Missouri, and vice versa, through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state line. The Commission stated that the testimony showed an industrious solicitation by appellant for the transportation of freight between St. Louis, Missouri, and Kansas City, Missouri, on the basis of his quoted interstate rate between such cities as set forth in his tariff filed with the Interstate Commerce Commission, which rate was much lower than the established rate for intrastate carriers operating between these cities, and that by such means a large volume of business had been developed. It appeared that he was carrying freight at the interstate first-class rate of 60 cents per hundredweight between St. Louis, Missouri, and Kansas City, Missouri, through his terminal at Kansas City, Kansas, while the similar intrastate freight rate established by the Public Service Commission between the two cities in Missouri was 92 cents per hundredweight.

On the challenge in this suit of the validity of the Commission's order, the district court heard the evidence of the parties and found that the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery, was not "the normal, regular, or usual route" for shipping merchandise between the two cities in Missouri; that the route used by appellant to his terminal at Kansas City, Kansas, was through Kansas City, Missouri, and that the same trafficways were used in making deliveries of merchandise after it had been hauled in the first instance to the terminal; that after reaching the terminal in Kansas City, Kansas, appellant in many instances did not unload the merchandise, that much of such shipments was in carload lots, and that the method employed was to haul the merchandise to his terminal in Kansas City, Kansas, "where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri. That, in some instances, merchandise . . . was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri," but that this was "a negligible percentage of the shipments between Missouri points"; and that the method of operation which appellant employed was designed to afford shippers the benefit of a lower rate and was not in good faith.

First.—By § 5268(a) of the Missouri Bus and Truck Act (Laws of

1931, pp. 307, 308), the state declared it to be unlawful for any common carrier by motor to furnish service within the state without first having obtained from the Commission a certificate of public convenience and necessity. By § 5268(b) it was declared unlawful for any motor carrier (with certain exceptions not material here) to use any of the public highways of the state in interstate commerce without first having obtained a permit from the Commission. It was provided that in determining whether such a permit should be issued, the Commission should give consideration "to the kind and character of vehicles permitted over said highway" and should require the filing "of a liability insurance policy or bond" in such sum and upon such conditions as the Commission might deem necessary to protect adequately the interest of the public in the use of the highway. The statute also authorized the Public Service Commission to prescribe regulations governing motor carriers.

Appellant's complaint did not attack these statutes; on the contrary he asserted that he had fully complied with their provisions. His complaint was of the order of the Commission revoking his permit. We confine ourselves to the question thus presented.

[2] *Second.*—When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded. H. P. Welch Co. v. New Hampshire (1939) — U. S. —, 83 L. ed. —, 27 P.U.R.(N.S.) 238, 59 S. Ct. 438; compare McDonald v. Thompson (1938) — U. S. —, 83 L. ed. —, 27 P.U.R.(N.S.) 31, 59 S. Ct. 176.

[3] *Third.*—Appellant did not seek from the state Commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. Hendrick v. Maryland (1915) 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 S. Ct. 140; Morris v. Duby (1927) 274 U. S. 135, 143, 71 L. ed. 966, 971, 47 S. Ct. 548; Clark v. Poor, 274 U. S. 554, 556, 71 L. ed. 1199–1201, P.U.R.1927D, 346, 47 S. Ct. 702; South Carolina State Highway Dept. v. Barnwell Bros. (1938) 303 U. S. 177, 189, 82 L. ed. 734, 741, 58 S. Ct. 510; compare Buck v. Kuykendall, 267 U. S. 307, 315, 69 L. ed. 623, 626, P.U.R.1925C, 483, 45 S. Ct. 324, 38 A.L.R. 286; Interstate Busses Corp. v. Holyoke Street R. Co. 273 U. S. 45, 51, 71 L. ed. 530, 534, P.U.R.1927B, 46, 47 S. Ct. 298; Sprout v. South Bend (1928) 277 U. S. 163, 169, 72 L. ed. 833, 836, 48 S. Ct. 502, 62 A.L.R. 45.

[4] Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his choice the one who had sought and obtained a permit exclusively for interstate trans-

portation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its face imposed any improper burden upon interstate commerce and the question is whether it did so through the application that the Commission has made of it.

[5–8] Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. Hanley v. Kansas City S. R. Co. (1903) 187 U. S. 617, 47 L. ed. 333, 23 S. Ct. 214; Western U. Teleg. Co. v. Speight (1920) 254 U. S. 17, 65 L. ed. 104, 41 S. Ct. 11; Missouri P. R. Co. v. Stroud (1925) 267 U. S. 404, 69 L. ed. 683, 45 S. Ct. 243. That fact, however, does not require the conclusion that the state's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 24 P.U.R.(N.S.) 119, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of Federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. Cooley v. Port Wardens (1851) 12 How. 299, 319, 13 L. ed. 996, 1004; Morgan's L. & T. R. & S. S. Co. v. Board of Health (1886) 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; Smith v. Alabama (1888) 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; Kelly v. Washington ex rel. Foss Co. (1937) 302 U. S. 1, 9, 82 L. ed. 3, 10, 58 S. Ct. 87. If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the Federal field or the subjection of interstate commerce to any unlawful restraint. And if the prohibition of such transactions was valid, the Commission was undoubtedly entitled to enforce it by revoking appellant's permit for breach of the condition upon which it was issued and accepted by appellant.

Fourth.—The ultimate question is thus one of fact, whether the transactions of appellant were of the character described by the Commission and in the findings of the district court.

The transcript of the record before the Commission was introduced before the court, but neither that evidence nor the additional evidence taken by the court is presented in extenso by the record here. The parties properly filed, in connection with this appeal, condensed statements of the evidence upon which they respectively relied. An examination of these statements discloses no reason for disturbing the court's findings.

Appellant stresses the fact that he had selected his terminal in Kansas City, Kansas, at the beginning of his operations as a motor carrier, about 1932, and that it was a convenient and proper location. But that fact does not alter the nature of the transactions under review. There was a variance in the testimony as to the extent of the appellant's business which was conducted in violation of his permit, but there was adequate basis for the court's finding that it was a considerable portion of his operations and justified the action of the Commission.

The decree of the district court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT. SUFFOLK

M. Francis Flynn

v.

Commissioners of Department of Public Utilities

(— Mass. —, 18 N. E. (2d) 538.)

Intercorporate relations, § 18.1 — Business trusts — Stock control.

1. Massachusetts statutes do not prevent Massachusetts trusts from holding a majority of the stock of a gas or electric company, and thereby controlling it, p. 296.

Consolidation, merger, and sale, § 33 — Business trusts — Exchange of stock interests.

2. A contract between two Massachusetts trusts exchanging stock interests in various gas and electric companies is not invalid for giving to one trust an increased majority ownership in and control of gas and electric companies located in Massachusetts or for giving a similar majority ownership in and control of such companies to the other trust, p. 296.

Consolidation, merger, and sale, § 6 — Contracts relating to affiliates — Commission jurisdiction.

3. A contract between two Massachusetts trusts exchanging stock interest in various gas and electric companies in Massachusetts was not within the supervisory and investigating powers and duties of the Commission, since, although each of the trusts concerned was an "affiliated company" of certain gas and electric companies within statutory definition, the contract in question did not relate to any "relations, transactions, and dealings" of such "affiliated company" with the gas or electric company with which it is affiliated of the sort described in the statute, p. 297.

Appeal and review, § 6 — Discretionary matters — Applicability of statute to private individuals.

4. Remedies provided by statute under which refusal of the Commission to

"investigate and examine" the contracts of any Massachusetts trust holding stock in a gas or electric company may be brought to the supreme judicial court in equity do not apply to a case in which a private individual is seeking to induce the Commission to take action which is discretionary and which the Commission may take or refuse according to its own judgment, p. 297.

Mandamus, § 3 — Commission jurisdiction over exchange of stock — Discretionary exercise.

5. A common stockholder in a Massachusetts trust cannot by mandamus require the Commission to consider his complaint concerning a contract between such trust and another transferring stock interest in various gas and electric utilities, since the Commission, even if it had power to act, had no duty to do so, but had a right in its discretion to remain inactive, p. 298.

[January 10, 1939.]

PETITION *for review in equity and petition for writ of mandamus to compel the Commission to deal further with complaint concerning contract between trusts; dismissed.*

APPEARANCES: M. Z. Kolodny, of Boston, and Wycliffe C. Marshall, of Watertown, for petitioner; R. Clapp, Assistant Attorney General, for respondent.

LUMMUS, J.: A common stockholder in a so-called Massachusetts trust, formed March 31, 1937, called Massachusetts Utilities Associates, seeks to compel the respondent Department to deal further with his complaint concerning a contract and transaction between that trust and another called New England Gas and Electric Association. The matter comes to this court (1) by petition for review in equity, and (2) by petition for a writ of mandamus. A single justice reserved both cases for the full court without decision.

The petition for review in equity is based upon G. L. (Ter. Ed.) Chap. 25, § 5, which requires the "Commission" (which substantially means the Department), "when so requested by any party interested," to "rule upon any question of substantive law properly arising in the course of any proceedings before" it, and gives to "any party in interest aggrieved by such ruling" the right to objection and review. The statute provides that "the supreme judicial court shall have jurisdiction in equity to review, modify, amend or annul any ruling or order of the" Commission, "but only to the extent of the unlawfulness of such ruling or order." The statute provides further that "the burden of proof shall be upon the party adverse to the Commission to show that its order is invalid." New England Teleph. & Teleg. Co. v. Department of Public Utilities, 262 Mass. 137, P.U.R. 1928B, 396, 159 N. E. 743, 56 A.L.R. 784; Salisbury v. Salisbury Water Supply Co. (1932) 279 Mass. 204, 181 N. E. 194.

Both trusts hold shares in many Massachusetts gas and electric companies. The transaction under attack, embodied in a contract dated January 4, 1937, made by the two trusts and a Delaware corporation, was one by which Massachusetts Utilities Associ-

ates was to acquire from New England Gas and Electric Association and the Delaware corporation a minority stock interest in various gas and electric companies in which it already had the majority interest, in return for a majority stock interest in Plymouth County Electric Company and Plymouth Gas Light Company and a sum of money. The petitioner asserts that the consideration passing to Massachusetts Utilities Associates is inadequate, that the transaction will affect adversely the operations of all gas and electric companies affiliated with it, and will affect adversely to consumers dealing with said companies the price of gas and electricity supplied by them.

[1, 2] Nothing in our statutes prevents a trust, like the two trusts concerned in this case, from holding a majority of the stock of a gas or electric company, and thereby controlling it. Such ownership and control are recognized by G.L. (Ter. Ed.) Chap. 182, § 3. Only domestic corporations are forbidden to hold more than 10 per cent of the stock of such a company. G.L. (Ter. Ed.) Chap. 156, § 5. See also, Chap. 181, § 10. The contract complained of, therefore, is not invalid upon its face, for giving to the Massachusetts Utilities Associates an increased majority ownership in and control of gas and electric companies located in this commonwealth, or for giving a similar majority ownership in and control of such companies to the other trust.

The right and duty of the Department of Public Utilities to investigate such a transaction depend upon a number of statutory provisions. It "shall have the general supervision of all gas and electric companies." G.L. (Ter. Ed.) Chap. 164, § 76. It "may" investigate the books etc. "of the trustees of any association or trust, who own or hold the capital stock or any part thereof of a . . . gas or electric company," and may require reports as to "the relations and dealings between such trustees and any such corporation or company." Chapter 182, § 7. It "may" investigate the books etc. of any trust or voluntary association which is under the same ownership, a control or management as a gas or electric company, "in respect of the relations and of any contracts and dealings between" them. Chapter 182, § 8. By Chap. 164, § 85, enacted as St. 1930, Chap. 395, as a result of the Report of the Special Commission on Control and Conduct of Public Utilities (1930 H. 1200, pages 88, 89), the Department "may" authorize its officers and employees to examine the books etc. or the physical property of any gas or electric company and of any affiliated company "with respect to any relations, transactions or dealings, direct or indirect, between such affiliated company and any" gas or electric company. Finally, by G.L. (Ter. Ed.) Chap. 164, § 76A, inserted by St. 1935, Chap. 335, § 1, the Department "shall have the general supervision of every affiliated company . . . with respect to all relations, transactions and dealings, direct or indirect, with the gas or electric company with which it is affiliated, which affect the operations of such gas or electric company, and shall make all necessary examination and inquiries and keep itself informed as to such relations, transactions and dealings as have a bearing upon the price of gas or elec-

tricity supplied by such company or the quality thereof."

The words "affiliated company" were defined by G.L. (Ter. Ed.) Chap. 164, § 85, both originally and as amended by St. 1935, Chap. 335, § 2, as including any trust, association, etc. "(a) controlling a company subject to this chapter [i. e., a gas or electric company], either directly, by ownership of a majority of its voting stock or of such minority thereof as to give it substantial control of such company, or indirectly, by ownership of such a majority or minority of the voting stock of another corporation or association so controlling such company; or (b) so controlled by a corporation, society, trust, association, partnership, or individual controlling as aforesaid, directly or indirectly, a company subject to this chapter; or (c) standing in such a relation to a company subject to this chapter that there is an absence of equal bargaining power between the corporation, society, trust, association, partnership, or individual and the company so subject, in respect to their dealings and transactions."

[3] We need not consider the standing of an individual stockholder like the petitioner to require the Department to exercise its "general supervision" and to make "all necessary examination and inquiries" with respect to a particular cause of complaint presented by him, and then to bring the matter before this court in equity under G.L. (Ter. Ed.) Chap. 25, § 5, or under the provision of G.L. (Ter. Ed.) Chap. 164, § 76A (St. 1935, Chap. 335, § 1), that "The supreme judicial court shall have jurisdiction in equity to enforce compliance with this section and with all orders of the Department made under authority thereof." See, also, G.L. (Ter. Ed.) Chap. 182, § 10. In the present case the contract and transaction under attack were not within the supervisory and investigating powers and duties of the Department under the Act of 1935. Each of the trusts concerned was no doubt an "affiliated company" of certain gas and electric companies, within the statutory definition. But the contract and transaction under attack did not relate to any "relations, transactions and dealings" of such "affiliated company" with "the gas or electric company with which it is affiliated of the sort described in the statute." The contract and transaction were wholly among the holding trusts and a foreign corporation, and were not within the statute. The Department was right in dismissing the complaint of the petitioner. It is not true, as contended by the petitioner, that the statute of 1935, so construed, would add nothing to the preëxisting law. The statute of 1935 made mandatory a supervision and examination that previously was permissive. The denial of certain of the petitioner's requests for rulings was immaterial since the right result was reached by the Department.

[4] The petitioner argues that, whatever may be the proper construction of the Act of 1935 (G.L. [Ter. Ed.] Chap. 164, § 76A), the Department had discretionary power to "investigate and examine" the contracts of any trust holding stock in a gas or electric company under G.L. (Ter. Ed.) Chap. 182, § 7, and that its refusal to do so in this instance may be brought to this court in equity under G.L. (Ter. Ed.) Chap. 25, § 5, or G.L.

(Ter. Ed.) Chap. 182, § 10. We do not consider whether G.L. (Ter. Ed.) Chap. 182, § 7, construed with reference to other sections dealing with the general subject matter, and particularly §§ 8–10, is limited to dealings with a gas or electric company, further than to note that the petitioner says in his brief, after citing § 7, that "all of the above provisions in force prior to the year 1935 only cover, in the manner set forth in the various statutes described, certain relations and dealings between gas or electric companies and companies related to them as affiliates." At any rate, we think that the remedies provided by G.L. (Ter. Ed.) Chap. 25, § 5, and Chap. 182, § 10, have no application to a case in which a private individual is seeking to induce the Department to take action which is discretionary and which the Department may take or refuse according to its own judgment. To hold otherwise would be to turn over to private individuals, especially if this court could be led to agree with them as to questions of law, a considerable control of the time and the activities of the Department, even in matters upon which its action or inaction is made discretionary by the statute. Such, we think, could not have been the legislative intention.

[5] For similar reasons the petitioner is not entitled to require by mandamus the consideration of his complaint by the Department, even if it is within the power of the Department to consider it and to investigate the contract and transaction under attack. This is not the case of a tribunal, like a court of justice, bound by law to receive, consider and dispose of all proceedings submitted to it according to established forms. In such a case this court, though it cannot direct what decision shall be made, may by mandamus require the tribunal to hear the controversy and make some decision. Crocker v. Justices of Superior Court (1911) 208 Mass. 162, 164, 94 N. E. 369, 21 Ann. Cas. 1061; French v. Jones (1906) 191 Mass. 522, 529, et seq. 78 N. E. 118, 7 L.R.A.(N.S.) 525; McLean v. Holyoke (1913) 216 Mass. 62, 102 N. E. 929; Knights v. Treasurer & Receiver General (1920) 236 Mass. 336, 337, 128 N. E. 637; Milton v. Auditor of the Commonwealth (1923) 244 Mass. 93, 96, 138 N. E. 589. Here the Department, under G.L. (Ter. Ed.) Chap. 182, § 7, even if it had power to act, had no duty to do so, but had a right in its discretion to remain inactive. In these circumstances it will not be spurred into action by mandamus. It may be doubted whether the duty of "general supervision" under G.L. (Ter. Ed.) Chap. 164, § 76A (St. 1935, Chap. 335, § 1), even if it extended to the contract and transaction under attack, could properly be enforced by mandamus commanding the Department to direct its attention specifically to the petitioner's complaint as to that contract and transaction, without regard to the question whether the Department considered it "necessary" to make examination and inquiries as to the matter beyond the facts already within its knowledge. But, as has been shown, that statute did not apply to the contract and transaction under attack.

Petition for review in equity dismissed.

Petition for writ of mandamus dismissed.

UTAH PUBLIC SERVICE COMMISSION

Re George A. Sims et al. Doing Business As Salt Lake Transfer Company

[Case No. 2114.]

Public utilities, § 98 — Common carrier status — Irregular routes.

1. The test of a common motor carrier operation, under § 1, Chap. 65, Laws of Utah, 1935, is whether a person holds himself out to the public as willing to transport for hire from place to place the property of persons who may choose to employ him, and the question whether the operation is over regular routes or over irregular routes is entirely beside the point, p. 302.

Public utilities, § 29 — Common carrier status — Rejection of business.

2. Neither the mental reservation of a carrier nor the posting of a notice to the effect that the carrier reserves the right to accept or reject any shipment of property offered is persuasive that the carrier is not operating as a common carrier, since the true test of the character of operation is the acts rather than the claims of the operator, p. 303.

Public utilities, § 26 — Common or contract carrier.

3. A true contract carrier operation is an operation based upon a bilateral contract binding both the shipper and the carrier to transport property for hire for a definite period of time and for a fixed rate, and oral agreements entered into between a carrier and a shipper, made at or about the time the shipment is received, are not such contracts as characterize the operation as contract carriage, p. 303.

[January 19, 1939.]

APPLICATION *for certificate of convenience and necessity to operate as a common motor carrier of property in intrastate commerce; application granted in modified form.*

APPEARANCES: John D. Rice, for state of Utah; Joseph S. Jones, for Mollerup Moving & Storage Company; Irwin Clawson and Herbert B. Maw, for applicant; F. M. Orem, for Salt Lake & Utah Railroad Corporation and Utah Central Truck Lines; J. A. Howell, for The Utah-Idaho Central Railroad Company; George H. Lowe, for Fuller-Toponce Truck Company; Sam D. Thurman, for Bamberger Electric Railroad Company and Sterling Transportation Company; K. Tracy Power, for Moab Garage Company, Salt Lake & Ogden Transportation Company, and Jos. J. Milne Truck Line; Geo. H. Smith and Robt. B. Porter, for Union Pacific Railroad; Van Cott, Riter and Farnsworth, for the Denver and Rio Grande Western Railroad Company and Rio Grande Motor Way, Inc.; D. S. Woolley, for Redman Van & Storage.

By the COMMISSION: On the 28th day of May, 1938, this application was filed in which the applicants sought a certificate of convenience and necessity to operate over all the highways of the state of Utah as a common motor carrier of property. The application was filed with the specific purpose of bringing before the Commission an alternate to the request made by the applicants in Case No. 1849, in which the applicants sought authority to operate as contract carriers, to perform a service identical with that which they proposed to perform under the certificate sought in this case, which operation would be similar to that which the applicants claim to have performed for a great number of years in the state of Utah.

A hearing was had on September 28, 1938, after due and legal notice had been given, which hearing was adjourned without the taking of evidence and was resumed November 21, 1938. The applicants submitted evidence showing the nature of their operations and the extent to which they were conducted over all of the highways of the state and attempted to prove that they were operating as common carriers. The protestants offered evidence showing the type of operations that they were performing and the probable effect that the granting of this application would have upon them.

A careful review of the circumstances and matters relating to the several applications of George A. Sims and Milton K. Sims which have come before this Commission is made in this report.

On the 6th day of March, 1934, George A. Sims and Milton K. Sims, a partnership doing business at Salt Lake City, Utah, in the firm name of the Salt Lake Transfer Company, filed an application with the Public Utilities Commission for a permit under the provisions of Chap. 53, Laws of Utah, 1933, to operate motor vehicles for hire as a "contract carrier of property" in intrastate commerce over and upon "all highways and anywhere in the state of Utah." This application was docketed as Case No. 1544.

After an extended hearing, the Public Utilities Commission issued its Report and Order on the 27th day of September, 1934, in Case No. 1544, denying the application for a contract carrier permit for the reason that in the opinion of the Commission the evidence proved conclusively that the operations of the applicant were common carrier operations rather than contract.

Relating to the applicants being a common carrier, the Commission said:

"Under the circumstances and by reason of the nature of their operations as detailed by the record herein, we believe them to be common motor carriers within the meaning of Chap. 53, Laws of Utah, 1933, and so hold."

Subsequently, on motion of the applicants, the Commission, by orders duly entered, extended the effective date of its September 27, 1934, order to April 15, 1935. On the 25th day of April, 1935, the Commission granted a rehearing on motion of applicants, following which Case No. 1544 was dismissed without prejudice on May 2, 1935.

Thereafter, and until the 3rd day of April, 1936, the applicants operated at will upon all the highways of the state of Utah by securing from the Public Service Commission special permits

authorizing each individual operation, or numerous operations, for given periods of time.

On April 3, 1936, and subsequent to the enactment of Chap. 65, Laws of Utah, 1935, George A. Sims and Milton K. Sims, doing business as the Salt Lake Transfer Company, again filed an application for a contract carrier permit under the provisions of Chap. 65, Laws of Utah, 1935, in which they sought authority to engage in the transportation of property on occasional hauls over all the highways of the state of Utah (Case No. 1849). On the same day, the Public Utilities Commission without a hearing granted to said applicants Contract Carrier Permit No. 125, authorizing them to engage in the transportation of property by motor vehicle over all highways of the state of Utah without any restrictions as to commodities or routes.

Following issuance of said permit by the Commission, The Denver and Rio Grande Western Railroad Company, Rio Grande Motor Ways, Inc., Fuller-Toponce Truck Company, Inc., The Utah Idaho Central Railroad Company, Salt Lake & Ogden Transportation Company, Joseph J. Milne Truck Line, Inc., Moab Garage Company, Sterling Transportation Company, Railway Express Agency, Bamberger Electric Railroad Company, Salt Lake & Utah Railroad Company, and the Union Pacific Railroad Company, each filed a petition for rehearing. On May 11, 1936, all of the petitions for rehearing were denied without hearing or argument.

The petitioners thereupon carried the matter to the supreme court and, on the 9th day of June, 1936, a writ of review was issued out of the supreme court of the state of Utah, commanding the Public Service Commission to certify to the supreme court a full, true, and correct record of the proceedings before said Commission in Case No. 1849, "In the Matter of the Application of George A. Sims and Milton K. Sims, doing business as the Salt Lake Transfer Company, for a permit to operate as a contract motor carrier of property in intrastate commerce." The record was promptly certified to the supreme court and following arguments and filing of briefs by the parties of record, the supreme court of the state of Utah on the 11th day of May, 1938, rendered a decision in which the court said, "it is now *ordered, adjudged,* and *decreed* that the order of the Public Service Commission denying plaintiffs' petition for a rehearing be, and the same is, annulled and the cause remanded to the Commission with instructions to fix a date for hearing, and to permit the plaintiffs to appear, offer testimony, amend if desired, and take any other steps appropriate, and thereafter to make findings and decision as the merits may require."

In pursuance of the order of the supreme court of Utah a hearing was held on the 15th day of June, 1938, after due and legal notice had been given, at which hearing all of the parties of record entered their appearances and were represented by counsel.

We have recited the history of Cases Nos. 1544 and 1849, somewhat in detail in order to present a complete picture of the controversy which has been carried on for the past four years in respect to the operations of the applicants.

The Commission has given careful consideration to the evidence presented by the respective parties and has given serious thought to the briefs which were filed by both applicants and protestants.

It is quite apparent that the application of the Salt Lake Transfer Company in Case No. 1849 was based upon a claim that said company was operating as a contract carrier on the 15th day of March, 1933. In other words, applicants insist that they come within the provision of § 9, Chap. 65, Laws of Utah, 1935, which reads in part as follows:

"The Commission shall grant on application to any applicant who was a contract motor carrier as defined by this act on the 15th day of March, 1933, a permit to operate as a contract motor carrier on the same highways and to carry on the same type of motor service as he was prior to said date. Where said applicants were operating on all the highways of the state prior to said date, the permit shall authorize them to continue to operate on all of said highways."

Although a number of difficult legal problems was presented during the course of the hearing, it will not be necessary to either discuss or decide them in view of the fact that the Commission believes that one of the principal issues involved herein is whether the applicants were operating as a contract carrier on the 15th day of March, 1933, so as to come within the provisions of § 9, Chap. 65, Laws of Utah, 1935.

Section 1 of Chap. 65, Laws of Utah, 1935, defines the term common carrier as follows:

" 'Common motor carrier of property' means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him."

Counsel for applicants in their brief in Case No. 1849, point to the fact that subsection 14 of § 1 of Chap. 2, Title 76, Rev. Stats. of Utah, 1933, defines common carrier as one who is "engaged in the transportation of persons or property for public service over regular routes between points within this state." It is contended that if it is necessary that one must be operating over regular routes to be a common carrier, then one who does not operate over regular routes is a contract carrier, and that in view of the fact that the applicants do not operate over regular routes and between fixed termini that they are contract carriers. If there is any distinction between the two definitions, the question is immediately raised as to whether the provision of subsection 14 of § 1, Chap. 2, Title 76, is still in effect.

Section 26 of Chap. 65, provides that all "acts and parts of acts in conflict herewith are repealed." Naturally, if there is any conflict or distinction between the two definitions, then the definition contained in subsection 14 of § 1, Chap. 2, Title 76, is no longer controlling.

[1] This Commission has consistently held that "regular route" and "fixed termini" are no longer the sole requirements for common carrier operations and that an operation over irregular routes without any fixed termini may also be a common carrier operation. In other words, we are inclined to hold that § 1, Chap. 65, Laws

of Utah, 1935, was intentionally made much broader than the old definition and that the test of a common carrier operation is whether a person holds himself out to the public as willing to transport for hire from place to place the property of persons who may choose to employ him. The operation may be over regular routes, or over irregular routes and it seems to us to be entirely beside the point, in view of the definition contained in § 1, whether the operation is one or the other so long as there is in fact a holding out for service to the public generally.

Holding as we do to the view that "holding out" is the true test to be applied, we shall look to the evidence to determine whether or not the applicants on or before the 15th day of March, 1933, held themselves out as being willing to undertake for hire to transport by motor vehicle from place to place the property of others who chose to employ them.

[2] It is quite true that the witness George Sims, one of the applicants, testified that at all times the Salt Lake Transfer Company reserved the right to accept or reject any shipment of property offered to the company, and that in more recent times—since March 15, 1933, a printed notice to that effect was posted in the office of the company. However, neither the mental reservation of the applicant, nor the posting of a notice in the office of the company is persuasive on this point. As indicated in our decision in Case No. 1849, the true test of the character of their operations is their acts rather than their claims. In other words, if the applicants, in spite of their mental reservation and posted notice, transported for hire the property of those who chose to employ them, they were, nevertheless, operating as common carriers. As recited in our decision in the other case referred to, the refusals were very few in number considering the number of customers served by the applicants and the long period of years during which applicants operated.

Furthermore, the advertisements published by the applicants contained no express or implied reservation of the right to refuse to transport property of those choosing to employ them. In every case where applicants refused to accept a shipment, witness George Sims gave no legal reason for the refusal. He did not state whether it was a question of rates or type of service, but simply that they couldn't get along. As a matter of law every common carrier has the right to refuse to accept a shipment if the shipper is not willing to pay the published rate or to comply with published rules and regulations of the carrier. We can see no distinction between the right reserved by, or the practice followed by the applicants, and the right reserved by, and the practice followed by common carriers generally.

[3] There is another point which is clearly brought out by uncontradicted evidence, and which, in our opinion, is quite persuasive, namely, the almost total lack of that contract relationship between the shipper and the carrier, which authorities generally concede to be typical of and necessary in contract carrier operations. Witness George Sims testified that applicants had only one written contract, which was in the form of correspondence between the shipper and the applicants. He further testified that all

of the agreements entered into between applicants and the shipper were made at, or about the time the shipment was received, and were not in writing.

It was also brought out clearly by the evidence that the applicants had no written contracts other than the one referred to above and no verbal contracts of a bilateral nature binding the shipper to ship or the applicant to receive and transport for any definite period of time or for any fixed rate. In other words, any other than the written contract that the applicants may have had with shippers were verbal contracts made at the time of the shipment and covered only the particular shipment offered. This type of contract differs in no respect from the type of contract entered into between common carriers generally and shippers. We are of the opinion that a true contract carrier operation is an operation based upon a bilateral contract binding both the shipper and the carrier to transport property for hire for a definite period of time and for a fixed rate.

It further appears that all of the highways of the state of Utah over which the applicants would ordinarily operate are not unduly burdened with traffic, and that the financial statement filed by the applicants showing net assets of $74,530.07 indicates that they are financially able to perform the operations herein proposed, and that said applicants have on file with the Commission the insurance required by law.

It appears that the only operations of applicants with which we are concerned in this case are: (a) the service in which they hold themselves out as common carriers to the public for the shipment of bulky property requiring special equipment, or service, over all the highways of the state, and (b) the service rendered by them as contract carriers as set forth in our Report and Order in Case No. 1849.

As has been said, this common carrier application was made by the applicants so that there would be assured to them the possibility of being granted rights to operate in substantially the same manner as they contended they had been operating in years past in the event the Commission should find them common carriers rather than contract carriers and deny their application in Case No. 1849.

With the exception of the contractees for whom the applicants have transported property as contract carriers, it appears to the Commission that all of their other operations which are subject to the jurisdiction of this Commission, are of the nature of irregular common carriers of: (a) commodities, which by reason of size, shape, weight, origin, or destination require equipment or service of a character not regularly furnished by common carriers at regular line rates, such as gasoline tanks, boilers, structural iron, CCC camp equipment, building materials, explosives, road equipment, harvesters, locomotives, drag-lines, pole-line construction material, heavy timbers, and other similar commodities; (b) commodities in connection with the transportation of which is rendered a service not now regularly furnished by other common carriers for the regular line rates, or by common carriers of specialized commodities; (c) camp supplies, furniture, fixtures, and accessories which are transported to camp sites or construction

camps; and (d) the transportation of general commodities to points and destinations in the state, but off from the route of the authorized common carriers.

The special nature of the service or equipment necessary to perform the operations heretofore set forth, the lack of facilities to render such service on the part of authorized common carriers, and the public demand for such service convince the Commission that public convenience and necessity exists to justify the granting of the application with respect only for the rendition of a service similar to, but more limited than that proposed, and in fact now being rendered by the applicants.

The Commission therefore concludes that the major portion of the operations conducted by these applicants, in fact all of the operations which have not been dealt with in the Commission's order in Case No. 1849, are those of an irregular common carrier, and that authority should be granted the applicants to operate over all of the highways of the state of Utah, transporting such commodities and rendering such services as those above described to the extent that necessity and convenience require such service.

An appropriate order will follow.

NOTE: In Re Sims (Utah) Case No. 1849, January 19, 1939, similar rulings were made on the status of the applicants, and authority was granted to operate as a contract carrier only to the extent that operations being carried on were of the nature of a contract carrier operation.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

John Sieminski et al. Supervisors of Township of Harmony, Beaver County

v.

Borough of Ambridge

[Complaint Docket No. 11604.]

Discrimination, § 39 — Classes of consumers — Loss in revenue.

1. Loss in revenue from one class of water consumer is not a valid reason for placing an additional burden upon another class, p. 308.

Rates, § 206.2 — Unit for rate making — Municipal plants — Service in suburban areas.

2. A statute providing that the regulation and control by the Commission of rates for service by a municipal corporation beyond its corporate limits shall be in like manner as if such service were rendered by a public utility indicates that the proper rates for service outside the corporate limits should be determined by considering the waterworks and service as a whole, rather

than only the facilities and service which are outside the corporate limits or may be allocated thereto, p. 309.

Depreciation, § 32 — Sinking-fund method — Municipal water plant.

3. An allowance for annual depreciation based upon the 4 per cent sinking-fund method applied to whole life expectancies of the various elements of a municipal water plant was approved, p. 310.

Return, § 100 — Municipal plants — Urban and suburban customers.

4. A return of 6 per cent was allowed in determining the reasonableness of the rates on a system-wide basis for a municipal plant serving customers both within and without the corporate limits, p. 310.

Municipal plants, § 11 — Jurisdiction of Commission — Rates — Extraterritorial service.

5. The Commission can prescribe that rates for like service furnished by a municipal plant to customers both within and without the corporate limits should be uniform throughout the entire system so that there be no unjust discrimination even though it has no jurisdiction over rates and service within the corporate limits, because the public utility law provides that rates for service by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the Commission with the same force, and in like manner, as if such service were rendered by a public utility, p. 310.

Rates, § 206.2 — Segregation of service units — Municipal plant.

6. Segregation of service units for rate-making purposes is not the rule, but the exception, and where marked differences in conditions in the area within and without the corporate limits of a municipality operating a water utility are not present, the normal rule of rate making will apply, p. 311.

[January 9, 1939.]

INVESTIGATION *based upon complaint that proposed rates of a municipal plant for service beyond municipal boundaries are unjust and discriminatory; complaint sustained.*

By the COMMISSION: Board of supervisors of Harmony township, Beaver county, complainant, on behalf of the several consumers of water in said township, receiving public water supply service from borough of Ambridge, respondent, alleges that the rates proposed to be charged for water by respondent, as set forth in its tariff —Water Pa. P. U. C. No. 2—filed with the Commission to be effective April 1, 1938, but suspended by Commission action in Complaint Docket No. 11605 to January 1, 1939, are excessive, prohibitive, unreasonable, unjust, and discriminatory. By agreement of counsel for the borough the date was further extended to January 9, 1939.

Respondent contends that the rates for service in the township must be determined on the basis of the fixed capital required and used for rendering this service and the operating expenses in connection therewith, so that there will be a reasonable return to respondent on said fixed capital.

Respondent has submitted of record, among other data, original cost of its used and useful waterworks facilities,

annual revenue, and annual operating expenses, all of which complainant accepts as reasonably correct. However, to apply the data for the purpose of determining rates applicable to Harmony township, a knowledge of the history of what now constitutes Ambridge waterworks appears essential.

The origin of the waterworks dates back to May 23, 1902, when Harmony Water Company, a privately owned corporation, was created to supply water to the public in Harmony township. On January 15, 1903, Ambridge Water Company, another privately owned corporation, was also created to supply water to the public in Harmony township. On June 1, 1905, a portion of Harmony township was incorporated as the borough of Ambridge. On December 30, 1909, Ambridge Water Company conveyed to Harmony Water Company all of its rights, franchises, property, and effects whatsoever. Harmony Water Company, as a private corporation, continued to furnish water service to the public until November 10, 1913, when Harmony Water Company sold and conveyed to borough of Ambridge all of its rights, franchises, property, and effects whatsoever for the sale and distribution of water both in township of Harmony and borough of Ambridge.

The borough's water tariff—Pa. P. U. C. No. 1—states, on page 2, that rates adopted on various dates, beginning with January 1, 1919, have been in effect over the entire system of the borough, both inside and outside the borough limits, between January 1, 1919, and—by reference to tariff—Water Pa. P. U. C. No. 2—to March 31, 1938, with exception of the period from June 5, 1924, to June 30, 1925, when a separate tariff applied to Harmony township.

For more than nineteen years, borough of Ambridge has not found it expedient or necessary to separate its water service business by the imaginary line that separates the borough from the township. In these many years the outside business has been up and down, profitable when the borough supplied large industrial consumers, and justifying extension of large mains and other facilities and also justifying catering to the suburban communities, economically dependent upon the industrial establishments, by providing service and facilities, which, when considering these communities purely from the domestic consumer business standpoint, might not have been justified.

Respondent's witness, S. L. Card, borough secretary, and also, for a number of years, secretary to the borough's water commission, until its abolition on April 5, 1937, stated of record that he believed it to be a fact that the water commission was concerned with the number of people who were moving out of the waterworks territory into surrounding communities other than Harmony township, and therefore conceived the plan of line extensions for the purpose of encouraging Ambridge residents who wanted to move out of the borough, to seek residences in Harmony township.

Respondent's Exhibit 31, which shows a "Chronological development of service to customers in Harmony township," indicates that, at the end of 1929, there were twenty-nine residential, one commercial, and two industrial consumers, producing revenues for that year as follows: Resi-

dential $782.75, commercial $743.76, and industrial $29,957.70. The annual revenue from industrial consumers during each of the years 1925 to 1930, inclusive, was: $15,128.52, $23,938.64, $16,776.68, $29,081.60, $29,957.70, and $27,050.98, respectively. From figures later to be stated, it appears that such revenues indicate a profitable water service business by borough of Ambridge in Harmony township. The exhibit further indicates that in 1931 the borough lost a major portion of its industrial business.

The lucrative public industrial service that prevailed for a number of years appears now to be permanently lost to the borough as, we understand, the industries found it financially advantageous to develop their own water supply. Ambridge v. Public Service Commission, 108 Pa. Super. Ct. 298, P.U.R.1933D, 298, 165 Atl. 47.

The number of consumers and anticipated revenue during 1938 are as follows: 296 residential consumers with revenue of $3,784, 7 commercial consumers with revenue of $306, 2 industrial consumers with revenue of $2,874, and one school with revenue of $99. Adding to these the revenue of $1,020 for fire protection service, the total anticipated revenue during 1938 from service in Harmony township is $8,083. From this it appears that there has been a drastic decline in the revenue from industrial consumers in Harmony township, the 1938 revenue being about 10 per cent of the annual revenue in the years 1928–1930.

The foregoing figures anticipated for 1938 are shown in respondent's Exhibit No. 31, which likewise shows the revenue for each year since 1919. This exhibit shows a continued rise to 1938 in the number of residential consumers and correspondingly in revenue, and a similar rise in the charge for public fire protection, but as indicated above, a very marked decline in industrial revenue which occurred in 1931.

In respondent's Exhibit No. 32, a summary of costs of service on the entire system, with an allocation of costs inside and outside of the borough limits, is set forth based upon the average operations for 1936, 1937, and the twelve months ended June 30, 1938. This exhibit likewise shows the average revenues of these three periods, from which it appears that the average annual revenue from the consumers in the township totals $8,980.

Respondent's Exhibit No. 29 shows an anticipated revenue, under the rates as proposed, of $11,780. Of this sum, $1,020 is for public fire protection service, the charge presently in effect, and $10,760 represents anticipated revenue from all the other consumers in the township. This sum of $11,780 is based upon the same data, that is, average operations for the years 1936, 1937, and the twelve months ended June 30, 1938, as is used in determining the sum of $8,980 on the rates presently effective. It therefore appears that respondent proposes to increase its charges to the consumers in Harmony township approximately 31 per cent.

[1] The total revenue from all consumers in Harmony township, industrial and domestic, for the years 1925–1930 varied between approximately $15,000 and $32,000 annually, while as indicated above, for the three years noted it has averaged approximately

$9,000. By its proposed rates, respondent would appear to be attempting to recoup some of this lost revenue and we are constrained to say that the loss in revenue from one class of consumer is not a valid reason for placing an additional burden upon another class, namely, in this instance, the residential consumer.

[2] The section of our law concerning rates and rate making is as follows:

"Section 301—Rates and Rate Making—Rates to Be Just and Reasonable. —Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the Commission: Provided, that any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits, shall be subject to regulation and control by the Commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility." (66 PS § 1141.)

The law states that the regulation and control, by the Commission, of rates for service, by a municipal corporation beyond its corporate limit, shall be in like manner as if such service were rendered by a public utility. Respondent's viewpoint, that its fixed capital in facilities, for rendering service in Harmony township, is of primary importance for rate-making purpose, is untenable. If the waterworks had remained privately owned, certainly the utility would not come before the Commission at this late date and ask for specially increased rates for a portion of its territory, which due to economic changes had retrogressed, particularly when the utility, taken as a whole, showed an earning capacity as evidenced by respondent's exhibits.

Respondent's position is that there should be allocated to service for consumers in Harmony township, all of its plant which is used solely for such purposes and, in addition thereto, a proportion of such parts of its plant, such as, for example, the wells, pumping station, filter plant, and transmission mains which are used for the production and transmission of water both inside and outside of the borough, as may be considered for use of the consumers outside of the borough. Upon this basis, respondent contends that $171,859 of its net investment in plant should be allocated as the cost of the plant required to render service to the public in Harmony township.

Contrasted to this, the township contends that the plant should be considered as a whole, without regard to geographical location, and that such features as the wells, pumping station, and filter plant, should be allocated for service to the consumers in Harmony township, on the basis of volume of water used by such consumers, compared to the whole volume of water used in the entire system, and that the remainder of the facilities, comprising essentially the distribution system, should be allocated upon the basis of the number of consumers in the township compared to the entire number of consumers.

We consider that the position of the township is arbitrary and wholly untenable. It absolutely ignores actual use of facilities and allocates on an arbitrary basis. If allocation were to be made, we would be inclined to accept the basis submitted by respondent.

Such basis recognizes actual use of facilities and what appears to us to be a reasonable proportion of facilities jointly used.

The circumstances, as previously set forth, concerning the development of the Ambridge waterworks, and the provisions of § 301 of Art. III of the Public Utility Law indicate that the proper rates for service in Harmony township should be determined by considering the waterworks and service as a whole, rather than only those parts of the plant and the service which are in or may be allocated to Harmony township. This method of approach will be employed in determining the justice and reasonableness of the proposed rates. However, only the rates applicable to service in Harmony township are under the jurisdiction of the Commission.

Respondent's Exhibit No. 32 shows the sum of $692,000 representing the net investment in respondent's waterworks system. This sum is set forth in detail and fully supported in respondent's Exhibit No. 18, to which complainants do not take exception. To this sum is added $21,500 for working capital, resulting in a rate base of $713,500.

[3] For operating and maintenance expenses, respondent's Exhibit No. 32 shows the sum of $57,670, which sum is not contested by complainants and will be adopted by us in fixing rates. For annual depreciation, respondent contends that $11,070 should be allowed. This sum is based upon the use of the 2 per cent sinking-fund method applied to whole life expectancies of the various elements of the plant. Respondent contends as its reason for so doing, that 2 per cent is all that can be safely earned on high-grade securities and that there is no opportunity for it to invest any of its depreciation reserve in its own plant.

In complainant's Exhibit No. 1, reference is made to the 4 per cent sinking-fund method and it appears that the sum of $6,700 would be needed annually over the whole life expectancies, upon which the corresponding figure presented by respondent of $11,070 is based, to accrue the total net investment.

We are unable to accept respondent's position that 2 per cent is all that could be earned in a sinking fund for depreciation reserve. The record in this proceeding indicates that respondent is presently constructing additional facilities which, of themselves, provide an immediate place for investment of funds in a depreciation reserve. Likewise, it is common knowledge, and we take judicial notice of the fact, that considerable in excess of 2 per cent can be realized over a period of years from securities of high grade. We are therefore constrained to adopt for annual depreciation, the sum of $6,700 as set forth in complainant's Exhibit No. 1.

[4] In determining the justness and reasonableness of the rates on a system-wide basis for respondent's waterworks, we will allow the sum of $57,670 for operating and maintenance expense, $6,700 for annual depreciation, and a 6 per cent return on the rate base of $713,500, that is, $42,810, resulting in a determination of total annual revenue of $107,180.

[5] While such is our finding with respect to the allowable revenue from the entire system, by virtue of the provisions of the Public Utility Law, we

have no jurisdiction over the rates and service within the corporate limits of the borough of Ambridge and, therefore, cannot fix and determine rates within the borough. However, because of its physical characteristics and historical developments, were this system a privately owned public utility, in order that there be no unjust discrimination, rates for like service would be uniform throughout the entire system. The Public Utility Law is specific in § 301, that rates for service by a municipal corporation beyond its corporate limits, shall be subject to regulation and control by the Commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility.

As set forth in respondent's Exhibit No. 32, the annual revenues average, for the three years noted in that exhibit, $89,704. This sum represents actual billings and, in addition, there is certain free service rendered by the borough for which no charge is made, totaling $7,281. It therefore appears that a proper measure of the revenue presently accruing to the borough for service rendered by it to all its consumers is $96,985 annually. Based upon our determination of total allowable revenue of $107,180, it appears that present revenues could be increased about 10½ per cent.

As stated above, rates throughout the system should be uniform. The consumers in Harmony township are charged, under the present rates, $8,980 a year. Increasing this sum by 10½ per cent, it would appear that a proper charge to these consumers is an additional sum of $943, or a total of $9,923. To so increase rates in Harmony township is in itself not an unjustly discriminatory act by Ambridge borough because it does not exceed the allowable return on the system basis.

[6] In Shirk v. Lancaster (1933) 313 Pa. 158, 169 Atl. 557, the supreme court, in determining the rate base for charges by a municipality furnishing water to its inhabitants and to inhabitants of its suburbs, found that for those within the corporate limits of the city, the fair value of the entire plant should be ascertained and that part used or useful in service outside the city deducted. While we recognize the principles enunciated by the court in that proceeding, we do not believe those principles are applicable to the facts in this case. The question involved in that case was whether the municipality could make a profit from its water business (p. 162). The court held that the municipality was entitled to a profit for rendering water service.

As hereinbefore set out, it appears to us that the provisions of § 301 of Art. III of the Public Utility Law govern. As provided for in that section, rates for service by a municipal corporation beyond its corporate limits shall be subject to regulation and control with the same force and in like manner as if such service were rendered by a public utility. Were this public water supply system privately owned, we would determine rates for service from that system on a system-wide basis.

Segregation of service units for rate-making purposes is not the rule, but the exception. In Wabash Valley Electric Co. v. Young, 287 U. S. 488–497, 77 L. ed. 447, P.U.R.1933A, 433, 437, 53 S. Ct. 234, the court said:

"Normally, the unit for rate-mak-

ing purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions. But conditions may be such as to require or permit the fixing of a smaller unit."

In Ben Avon Borough v. Ohio Valley Water Co. 2 Pa. P. S. C. 733, 757, P.U.R.1917C, 390, 419, the Public Service Commission held, in reviewing the subject of uniformity of rates in the district served by that respondent that, while the costs of delivering water to the several municipalities served by it were not the same, rates should be uniform and used the following language:

"The cost to the Ohio Valley Water Company of delivering water to the several municipalities served by it is not the same. Water can be supplied to the south side of the river cheaper than to the north side. This is true not only on account of the additional distance and the topographical conditions, but in order to reach the north side, the company was obliged to construct and must maintain, two 12-inch mains under the Ohio river with the accompanying risks. Each succeeding borough on the north side means an increased distance which requires not only additional expense for mains and other construction, but also additional power to supply the water thereto.

"On account of its elevation, the cost of supplying water in Westview borough and Ross township is more than the cost in Bellevue or McKees Rocks. We were not furnished any definite data as to the cost of delivering water in the several municipalities supplied by the respondent. Evidence was furnished, however, to the effect that water supplied to Westview borough and Ross township required repumping and the approximate cost thereof was given as well as the approximate amount of water required to be repumped.

"Taking into consideration that the water furnished by the respondent is all secured from the same source and is supplied to the several contiguous municipalities embraced in one general district, without any great difference in cost, we have reached the conclusion that all the rates in all the districts served by respondent should be the same. There are no such substantial differences in circumstances and conditions of the service as to justify any other than uniform rates."

The respondent in that proceeding rendered service to two separate groups of municipalities on either side of the Ohio river, and even under these circumstances the Commission, recognizing that costs were different in these different areas, held that rates should be uniform throughout the whole district served. Also see New Castle v. Pennsylvania Power Co. (1936) 15 Pa. P. S. C. 347 (15 P.U.R.(N.S.) 290).

In the instant proceeding, the area served by the borough of Ambridge is complete unto itself and is served from a composite waterworks system. There is a community of interest throughout the entire area served and as hereinbefore pointed out, the borough of Ambridge was incorporated and formed from a portion of Harmony township.

It is true that topographical char-

acteristics in the township were cited by respondent as a reason for plant allocation and segregation of rates. Such contention is not based upon fact. The record reveals that while Harmony township in some areas is of higher altitude that the highest areas within the borough limits, other areas in the township are at the same elevation or lower than Ambridge proper. Likewise, some of the facilities lying outside the borough limits, such as booster pumps, are used for the system both inside and outside the borough. Likewise, to segregate plant on the basis of the operations inside the borough and outside the borough, without taking into consideration further segregation between the service areas outside the borough, might prove inequitable.

Service is supplied to two well-settled communities in the township. The two communities are several miles apart. Between them lie two other service areas, to wit, the Ambridge country club and the Ambridge borough park, both situate in the township.

If separate rates were to be fixed within the corporate limits of the borough, it would more than likely be done for the purpose of securing lower rates for this area since population would be denser and closer to the point of water supply. Carrying this thought further, a further segregation might be made of those consumers within the area immediately surrounding the filter plant and pump station, and because of their proximity to such plant, allocation of property to serve them might result in still lower rates than would generally obtain throughout the borough.

To carry the theory of segregation to its ultimate conclusion, it may be proper to break down the plant allocation to the township into four distinct units. This of course, would prove burdensome not only upon the borough but upon the township, by way of engineering, accounting, and legal expense.

Under all of the facts and circumstances in the instant proceeding, it appears to us that marked differences in conditions in the areas within and without the borough are not present, so that the normal rule of rate making would apply, based upon the unit of the water system as a whole and that the rule in Shirk v. Lancaster, *supra,* is not controlling. The principal question to be decided here is whether circumstances justify segregation. The Commission resolves this question against respondent and holds that segregation is not justified.

Since the rates as proposed are anticipated to produce from the consumers in Harmony township the sum of $11,780 annually, we find and determine that such rates will produce an excessive return and are therefore unjust and unreasonable and should not be permitted to become effective; therefore,

Now, to wit, January 9, 1939, it is *ordered:* That the complaint be and is hereby sustained.

It is *further ordered:* That respondent, borough of Ambridge, be and is hereby restrained from making effective its tariff—Water, Pa. P. U. C. No. 2.

UNITED STATES DISTRICT COURT, D. NEW JERSEY

National Broadcasting Company, Incorporated

v.

Board of Public Utility Commissioners of New Jersey et al.

(25 F. Supp. 761.)

Constitutional law, § 2 — When question decided — Validity of statute — Radio regulation.

1. The question whether or not a state act regulating radio broadcasting is unconstitutional in so far as it applies to radio operation strictly intrastate should not be decided in a suit to restrain state authorities from enforcing the statute against radio operation in interstate commerce, p. 316.

Interstate commerce, § 55.1 — Radio regulation — Powers of state.

2. State authorities have no power to regulate the erection and construction of a broadcasting station or transmitter for radio transmission and reception when the radius extends beyond state lines, since the operator of such a station is subject to regulation only by the Federal Communications Act, p. 316.

[December 23, 1938.]

SUIT *to restrain state Commission from proceeding under state statute regulating radio broadcasting and under its order to cease and desist, and to restrain the attorney general from bringing actions for restraint or for fines or penalties pursuant to same statute; injunction granted.*

APPEARANCES: Autenrieth & Wortendyke, of Newark, N. J. (Thomas G. Haight, of Jersey City, N. J., and Henry Ladner, of New York city, of counsel) for plaintiff; John A. Bernhard, of Newark, N. J., for defendants Board of Public Utility Commissioners of New Jersey, Harry Bacharach, Thomas L. Hanson, and Frank Reardon.

Before Davis, Circuit Judge, Avis and Forman, District Judges.

FORMAN, D. J.: The plaintiff, National Broadcasting Company, Incorporated, a corporation organized and existing under the laws of the state of Delaware with its principal office at 30 Rockefeller Plaza in the city of New York, is engaged in radio broadcasting throughout the United States, and

maintains several broadcasting transmitters at Bound Brook, New Jersey. On May 2, 1938, there was issued to the plaintiff by the Federal Communications Commission pursuant to the Federal Communications Act of 1934, 47 USCA § 151 et seq., a construction permit authorizing it to erect an additional radio transmitter at Bound Brook, N. J. By the terms of the permit, construction was to begin by July 2, 1939. One of the purposes of the transmitter is to transmit broadcasting programs to the city of New York and vicinity in interstate commerce.

On May 16, 1938, the defendant Board of Public Utility Commissioners of the state of New Jersey by letter directed plaintiff to make application pursuant to the Radio Broadcasting Act, Title 48, Chap. 11 of the Revised Statutes of New Jersey, providing: "No radio broadcasting station or transmitter shall be constructed or operated in this state until a certificate of public convenience and necessity therefor shall have been granted by the Board of Public Utility Commissioners, . . ." Section 1.

This act in general provides for the regulation of radio broadcasting by the Board of Public Utility Commissioners of the state of New Jersey. This Board is authorized to ". . . impose and incorporate in the certificate, such reasonable restrictions and conditions as it may deem necessary or proper to avoid unreasonable blanketing or interference with radio transmission and reception." New Jersey Rev. Stats. 1937, 48: 11–6.

The attorney general is vested with power to institute actions to restrain the erection and construction of any broadcasting station or transmitter which does not comply with the terms of the act, and also to collect penalties of $100 per day for the violation of the act of any restrictions or conditions imposed by the Board, in an action at law in the name of the state.

Plaintiff declined to comply with the request of the Board of Public Utility Commissioners on the grounds that it already had the approval and authorization of the Federal Communications Commission, that the defendant-board was without jurisdiction in the matter, and the statute of New Jersey had been superseded by the act of Congress *supra* and was invalid.

On September 14, 1938 the defendant-board pursuant to the state statute issued an order requiring the plaintiff to show cause before it on November 1, 1938 why the plaintiff should not cease and desist in the erection, construction, or operation of the broadcasting transmitter in broadcasting service or otherwise.

This action is to restrain the Board of Public Utility Commissioners permanently from taking any action or proceedings under the statute and its order to cease and desist, and to restrain the attorney general from bringing actions for restraint or for fines or penalties.

It is contended that the Radio Broadcasting Act of the state of New Jersey is unconstitutional in that it interferes with interstate commerce, and that Congress has preëmpted the field of radio regulation by the act known as the "Communications Act of 1934" and its amendments, 47 USCA § 151 et seq., leaving nothing for the state to control within this field.

The plaintiffs not only ask that the

state statute be declared unconstitutional as applied to it, but further pray that each and every part thereof be declared unconstitutional.

By stipulation the case was heard upon bill of complaint, affidavits and answer as if upon final hearing. Also, the defendant David T. Wilentz, attorney general of the state of New Jersey, adopted and joined in the answer of the defendant Board of Public Utility Commissioners.

[1, 2] The only difference between the parties is whether or not the state act should be declared wholly unconstitutional in this suit. The plaintiff contends this type of regulation is exclusively within the power of Congress. The defendants urge that the state act is not unconstitutional in so far as it applies to such radio operation as might be considered strictly intrastate commerce. This court is not called upon to decide this difference because the defendants do not question that this plaintiff is or will be engaged at the station in question in the radio field on a scale that constitutes interstate commerce. They admit that broadcasting constitutes interstate commerce as to transmission and reception when the radius extends beyond state lines. United States v. American Bond & Mortg. Co. (1929) 31 F. (2d) 148, affirmed (1931) 52 F. (2d) 318, P.U.R.1932A, 522, certiorari denied (1932) 285 U. S. 538, 76 L. ed. 931, 52 S. Ct. 311.

Hence, this plaintiff is subject to regulation only by the Federal Communications Act and not by the New Jersey Radio Broadcasting Act, and a permanent injunction will issue restraining the defendants from proceeding against the plaintiff under the latter state statute.

WISCONSIN PUBLIC SERVICE COMMISSION

Re Boscobel Telephone Company

[2–U–1320.]

Rates, § 573 — Telephone — Free interexchange.

1. Free interexchange telephone service is generally inconsistent with the maintenance of reasonable and nondiscriminatory rates and service, but where the same company furnishes all or a substantial part of the telephone facilities to closely located communities, there should be a general consistency in the application of rates for service between exchanges beyond the local exchange area, p. 317.

Rates, § 580 — Telephones — Free interexchange.

2. Telephone companies that furnish free interexchange service in one direction over toll circuits should, in the absence of special circumstances, provide free interexchange in the reverse direction between the same points, p. 317.

[February 14, 1939.]

RE BOSCOBEL TELEPHONE CO.

APPLICATION for authority to continue free interexchange service between points to which a former order had authorized the discontinuance of such service; former order modified by eliminating therefrom authority to charge standard toll rates between communities affected thereby.

APPEARANCES: Boscobel Telephone Company, by Charles A. Blair, Boscobel; Crawford County Telephone Company, by Leo M. Perrott, Boscobel, and M. J. Halloran, Soldiers Grove; Wisconsin State Telephone Association, by J. E. Byrne, Madison; Peoples Telephone Company, by J. E. Welsh, Mt. Hope; Commonwealth Telephone Company, by Walter Wellman and L. F. Shepherd; of the Commission staff, Kenneth J. Jackson, Senior Case Investigator.

By the COMMISSION: On December 8, 1938, an order was entered on the application of Boscobel Telephone Company, Boscobel, authorizing among other things the discontinuance of free interexchange service between Boscobel and Wauzeka. On December 19, 1938, applicant requested authority to continue free interexchange service between these points. This request was accepted as a petition for rehearing and was granted on January 5, 1939.

The record indicates that the applicant reluctantly requested the continuance of free interexchange service after considerable discussion with officers of the Crawford County Telephone Company, which company together with the Commonwealth Telephone Company owns a part interest in the switchboard and serves subscribers at Wauzeka. The Crawford County Telephone Company is composed of 412 farmer stockholders, 47 of which are switched by the Boscobel Telephone Company, and has heretofore guaranteed its subscribers free interexchange service between the points herein involved. It also operates exchanges at Barnum, Mt. Zion, and Steuben, and renders free interexchange service between these points and Boscobel. These latter three exchanges are approximately the same distance from Boscobel as Wauzeka.

[1] As a general thing free interexchange service is not consistent with the maintenance of reasonable and nondiscriminatory rates and service. However, where communities are as closely located as Barnum, Mt. Zion, Steuben, and Wauzeka, and in all of which the same company furnishes all or a substantial part of the telephone facilities, there should be a general consistency in the application of rates for services between exchanges beyond the local exchange area.

[2] The Commonwealth Telephone Company was rendering free interexchange service between Wauzeka and Boscobel prior to 1936 and since that time has been charging a toll without authority. As a consequence it must be concluded that the lawful service of the Commonwealth Telephone Company between Wauzeka and Boscobel over the line of the Crawford County Telephone Company can only be on a free interexchange service basis, for although in Docket 2–U–

1323 it requested the discontinuance of free interexchange service between certain points in this area it made no such request with respect to the points herein involved. If free interexchange service is rendered in one direction over toll circuits, it seems desirable in the absence of special circumstances to the contrary to provide free interexchange in the reverse direction between the same points. Accordingly, we believe that Boscobel subscribers also should not be required to pay toll on calls to Wauzeka in addition to Barnum, Mt. Zion, and Steuben.

The Commission finds that the continuance of free interexchange service between Boscobel and Wauzeka by the Boscobel Telephone Company is reasonable and lawful.

WASHINGTON SUPREME COURT

State ex rel. Albers Brothers Milling Company

v.

Department of Public Service et al.

[No. 27213.]

(— Wash. —, 86 P. (2d) 196.)

Reparation, § 32 — Schedule established as bar to reparation — Freight charges.

Freight charges made in accordance with tariffs filed by carrier with the Commission constitute the lawful rate and recovery of charges for shipments made prior to the filing of shipper's complaint with the Commission may not be had by way of reparation.

[January 6, 1939.]

EN BANC. APPEAL *from judgment affirming an order dismissing a complaint praying for an order directing that railroad cease and desist from collecting unlawful charges and pay, by way of reparation for unlawfully collected charges, the difference between the charges already collected and the lawful and proper charge; affirmed.*

APPEARANCES: Donald H. Marken, of Seattle, for appellant; G. W. Hamilton, Don Cary Smith, and Frederick J. Lordan, all of Olympia, and W. E. McCroskey, Edwin C. Matthias, and A. J. Clynch, all of Seattle, for respondents.

HOLCOMB, J.: This is an appeal from a judgment which affirmed an order entered by the Department of Public Service dismissing the complaint.

October 19, 1936, appellant filed a complaint with the Department of Public Service in which it alleged that effective October 28, 1933, respondent railway published a rate on oats in car-load quantities of 10 cents per one hundred pounds from Anacortes, Bellingham, and Sedro-Woolley, Washington, to Seattle, Washington; that this rate appeared in Supplement 28-A of Tariff 10-G, W. D. P. W. No. 344; that respondent assessed and collected from appellant on oats in car-load quantities, moving from stations directly intermediate from Bellingham and Sedro-Woolley via the same line to appellant's plant at Seattle, a charge of $1.80 per car, plus an emergency charge of ten per cent additional during such time as this charge was lawfully in effect, in addition to freight charges predicated upon a rate of 10 cents per one hundred pounds; that respondent, in charging and receiving from appellant the sum of $1.80 per car plus the emergency charge where effective, in excess of the contemporaneous charge accruing upon like car-load shipments from more distant points via the same line, was violating Rem. Rev. Stat. § 10358; and that respondent commenced the collection of the aforementioned excessive charges on November 8, 1933, on car-load shipments of oats originating at Burlington, Washington, moving to appellant's place of business in Seattle. No violation of a Federal statute is involved but only the state long and short-haul statute, and only intrastate and not interstate operations.

Appellant prayed that an order be entered directing respondent to cease and desist from the violation of Rem. Rev. Stat. § 10358, and to pay respondent by way of reparation for the unlawfully collected charges, the difference between the charges already collected and the lawful and proper charge.

Respondent railway denied that the exaction of the above-mentioned charges constituted a violation of the statute in question, denied appellant is entitled to any reparation, and entered a general denial to the complaint.

The facts are not in dispute and were stipulated by the parties.

October 28, 1933, respondent railway published a rate in Supplement No. 28-A to the North Pacific Coast Freight Bureau, Tariff No. 10-G, on whole oats in car-load quantities of 10 cents per one hundred pounds to Seattle, Washington, from Bellingham and Sedro-Woolley. Commencing in November, 1933, appellant shipped a quantity of oats from points intermediate to Bellingham and Sedro-Woolley via respondent railway. In addition to the rate of 10 cents per one hundred pounds for the transportation from stations intermediate to Bellingham, Sedro-Woolley, and Seattle, respondent railway company assessed and collected from appellant on such shipments a switching charge of $1.80 per car, which charge was assessed by the Northern Pacific Railway Company for switching cars in Seattle from the Great Northern-Northern Pacific interchange to the plant of appellant. Appellant's plant is located adjacent to the tracks of the Northern Pacific

Railway Company, and can only be reached by respondent railway through the switching service performed by the Northern Pacific.

The parties stipulated that in view of the fact that the shipments in question were shipped from noncompetitive points, that is, from stations not served by any other railroad reaching Seattle, respondent railway assessed and collected the switching charge from appellant, since there was no authority published in the Great Northern Railway Tariff GFO 2500-B for the absorption of such switching charges assessed by the Northern Pacific.

The parties further stipulated that on car-load shipments of oats over a longer route, that is, from Bellingham and Sedro-Woolley to Seattle, routed via respondent railway, the switching charge of $1.80 assessed by the Northern Pacific Railway Company at Seattle was absorbed by respondent railway under the provisions of Item 15 of the Great Northern Railway tariff, GFO, 2500-B, and such absorption by respondent railway from these competitive points is the customary manner of publication in order to equalize the charges to the shipper via the two competing carriers.

The parties agreed that the Department of Public Service could decide this matter upon the stipulation and briefs, and enter its order as if a formal hearing had been held.

The Department entered an order dismissing the complaint and denied the relief prayed for. Thereafter appellant applied to the superior court of Thurston county for a writ of review, and judgment was entered sustaining the order of dismissal made by the Department. From that judgment this appeal is taken.

Appellant contends the trial court erred in affirming the departmental order for the reason that the aggregate compensation collected by respondent railway exceeded the aggregate compensation which, under the law, it had the right to collect.

The stipulation sufficiently shows the fact to be that the charges, upon account of which complainant seeks recovery in this action, were made in accordance with the tariffs filed by the carrier with the Department of Public Service. The tariff on file constitutes the "lawful rate," and recovery may not be had on account of charges for shipments made prior to the filing of the complaint in the Department of Public Service. Puget Sound Nav. Co. v. Department of Public Works, 157 Wash. 557, P.U.R.1930E, 289, 289 Pac. 1006; State ex rel. Standard Oil Co. v. Department of Public Works (1936) 185 Wash. 235, 12 P.U.R.(N.S.) 229, 53 P. (2d) 318.

The judgment is affirmed.

Steinert, C. J., and Main, Beals, Geraghty, Blake, Robinson, Simpson, and Millard, JJ., concur.

Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

Associated Gas and Electric Budget Exceeds 1938

THE Associated Gas and Electric System's expenditures will exceed the $14,048,000 spent in 1938 on construction and improvement to facilities of the various operating companies in the system, according to a recent announcement.

During the last ten years, Associated Gas and Electric's expenditures totalled more than $200,000,000. The low was $6,200,000 in 1933 as compared to $45,867,000 in 1929.

The New York State Electric & Gas Company is the largest operating company in the system and received the lion's share of the 1939 budget.

Art Emphasized in IBM Exhibit at World's Fair

AN international exhibition of paintings, the canvases representing the work of living artists in each of seventy-nine countries, at the New York World's Fair in the Gallery of Science and Art, is sponsored by Mr. Thomas J. Watson, as president of the International Business Machines Corporation. Housed in a vast oval room, especially designed and lighted for its presentation, and located in the Business Systems and Insurance Building, the collection makes one of the most interesting displays of ethnic art ever assembled under one roof. It offers the visitor an opportunity to compare, in a single showing, the characteristic art of today as practiced by men and women, in near and remote parts of the world, many trained but still others entirely lacking in any formal art education. The paintings were chosen by the leading art authorities in the seventy-nine countries where the corporation has representation.

The International Business Machines Corporation's Gallery of Science and Art, Mr. Watson said, is an endeavor to increase the interest of business in art and of artists in business, and to create something of permanent educational and cultural value, not only to the millions who will visit the Fair but to the people of our own and other countries who will eventually be able to see the exhibition.

A jury of awards will be selected by leading museum directors and critics, and cash prizes will be given to the ten artists whose pictures are adjudged best of all those shown in the collection. Each artist, regardless of whether or not he wins one of the cash prizes, will receive a specially designed medal commemorating the selection of his work for the exhibition.

Also on view in the Gallery is a display of the company's latest scientific developments in machines and methods, created by three hundred research engineers and their assistants.

Improved Office Methods Save Time and Money

EXECUTIVES confronted with the problem of handling an increased volume of office work, or concerned about saving time and money by handling the present volume more efficiently, will be interested in a practical booklet entitled "Ways to Save Time in an Office," which has just been issued.

This 20-page brochure compiled by the Burroughs Adding Machine Company is timely for executives in all lines because it deals with the elimination of needless motions. In a simple, clear-cut manner, it presents valuable suggestions intended to guide executives in locating the costly operations that handicap office employees.

Taking as its theme the thought that through improved methods most offices can handle their work in the regular hours and with the regular staff, the booklet actually is a collection of ideas based on Burroughs' experience of more than fifty years in studying office methods and helping business develop more efficient procedures.

Annual AGAEM Convention in New York, May 24th-26th

THE annual convention of the Association of Gas Appliance and Equipment Manufacturers will be held at the Roosevelt Hotel, in New York, May 24th-26th, according to Lucian Kahn, chairman of the association's convention program committee.

Sales promotion and its application to the gas appliance industry will be discussed by R. S. Agee, sales promotion manager for the association's domestic gas range division. The various product divisions will hold individual meetings.

The Honorable H. Styles Bridges, U. S. Senator from New Hampshire, will address the manufacturer members on current legislative trends and how they are affected by national and international events.

A general session will be held Friday, May 26th, in the Gas Industries Building at the New York World's Fair. There in the "Court of Flame," Hugh H. Cuthrell, president of

The Northwestern Electric Co., Portland, Ore., uses this International as a line truck. The body was designed by its engineering department. It won second place in the Automotive Bodies division in the contest on "Arc Welding and Its Applications" sponsored by the James F. Lincoln Arc Welding Foundation.

Gas Exhibits, Inc., will welcome the convention delegates and outline the predominant part that the gas industry is playing in this great international exposition.

The closing event of this year's convention will be a luncheon to be given for delegates and their wives in the "Court of Flame" restaurant in the Gas Industries Building at the Fair.

The general program has been so planned as to eliminate any afternoon sessions thus giving visiting delegates an opportunity to visit the World's Fair and to view New York's numerous scenic points of interest.

The convention program committee, of which Mr. Kahn is chairman, includes: F. E. Sellman, of New York, vice president of Servel, Inc.; E. C. Adams, president, Adams Brothers Manufacturing Co., Pittsburgh, Pa.; T. T. Arden, sales manager, Milwaukee Gas Specialty Co., Milwaukee, Wisc.; R. L. Clewell, of the National Radiator Corp., Montclair, N. J.; J. Scott Fowler, president, Lovekin Water Heater Co., Philadelphia, Pa.; Philip S. Harper, president, Harper-Wyman Manufacturing Co., Chicago; Merrill N. Davis, executive vice president, S. R. Dresser Manufacturing Co., Bradford, Pa.; W. P. Hutchinson, president, Sprague Meter Co., Bridgeport, Conn.; W. P. Smith, vice president, Continental Water Heater Co., Los Angeles, Calif.

New Radio Transit Car for B.-M. T. System

A STREAMLINED, three-unit compartment car for rapid transit service embodying the latest advances in structural design and electrical equipment has been placed in subway service by the Brooklyn-Manhattan Transit System. The car is powered and controlled by G-E equipment similar to that used in P. C. C. type cars for surface transit lines.

Built principally of aluminum alloys, the car is 80 feet four inches long, ten feet wide, and weighs only 76,000 pounds—about half the weight of a conventional car of the same size. Its three compartments are mounted on four rubber-cushioned trucks, making the car an articulated unit. Wheels are resilient with interleaved layers of steel and rubber.

The interior of the car is beautifully lighted with non-glare, high-intensity lights. A constant forced circulation of clean air through the car provides comfortable ventilation. In winter the air is heated by being drawn over the resistance coils of the braking system.

Edwin C. Faber Heads Collier Advertising Organizations

MANY friends in both advertising and transportation circles will be glad to learn that Edwin C. Faber has been elected to succeed Barron Collier, recently deceased, as president of all the Collier Transportation Advertising Organizations. Barron Collier, Jr., has been appointed vice president in charge of sales.

For the past seventeen years, Mr. Faber has been associated with Mr. Collier as vice president of the vast Collier Transportation Advertising interests and the last seven years in the capacity of executive vice president. He is a past president of the Illinois Public Utilities Association and has been actively associated with the American Transit Association and is also president of the Chicago, Aurora & Elgin Railroad, which together with his varied business experiences eminently qualify him for the position he has just assumed.

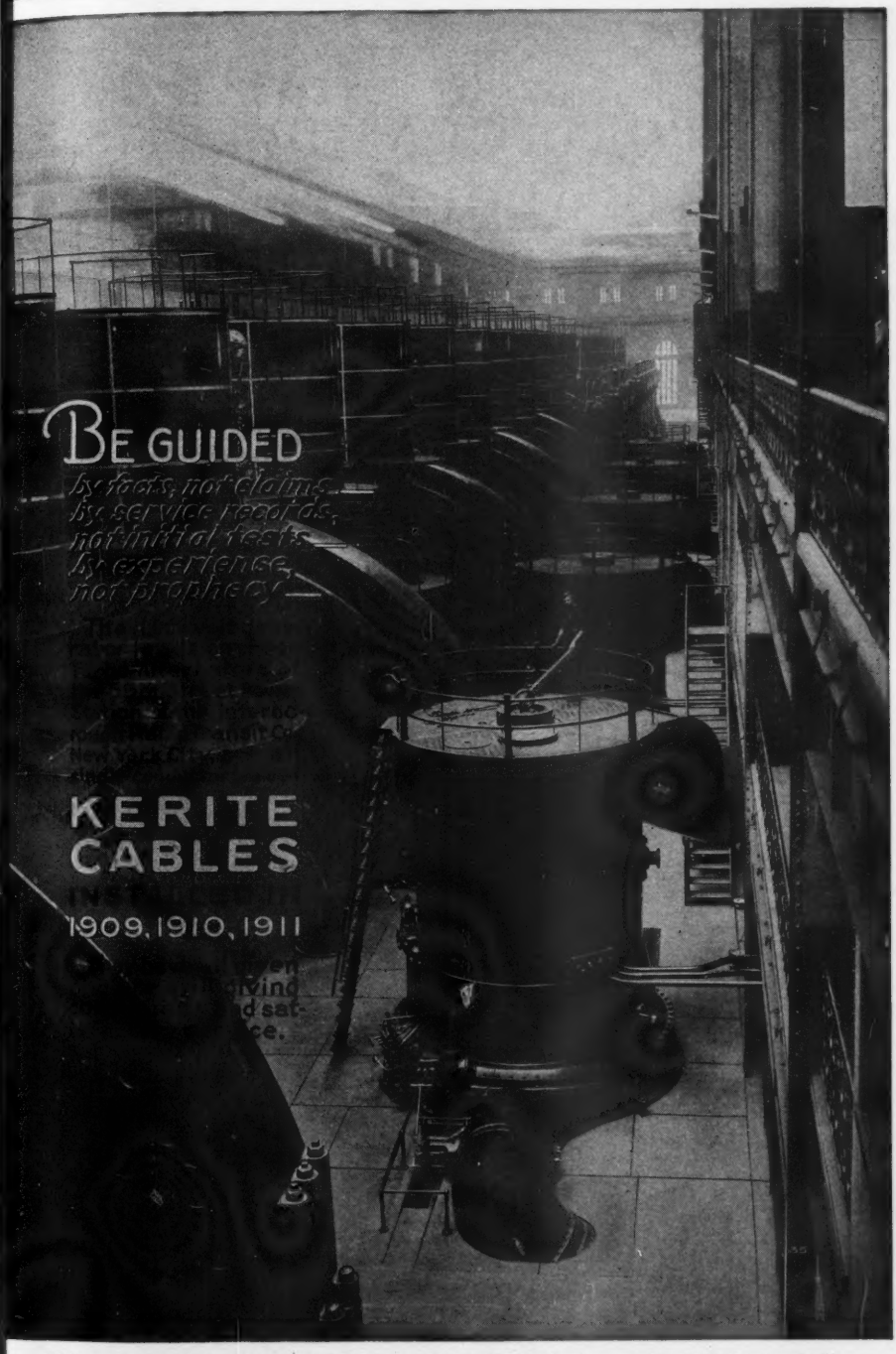
Mr. Faber will also act as chairman of an executive committee comprised of Mr. W. A. Buckner, vice president and counsel; Mr. Samuel C. Collier, vice president in charge of finance, and Mr. J. Q. Parr, vice president in charge of operation. Mr. O. J. Griesar will be comptroller of the organization.

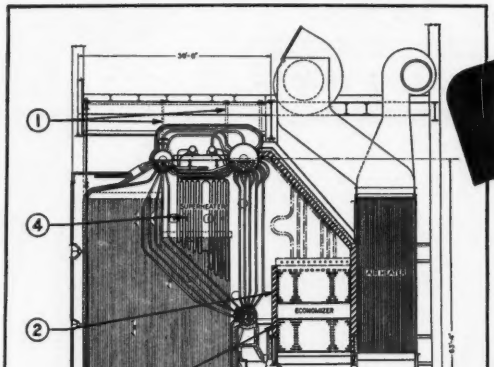
Since his graduation from Yale in 1930 and his entry into the transportation advertising field, Mr. Collier, Jr., has gained the confidence and support of advertisers and their agencies.

Mr. Collier credited the appearance of many outstanding new advertisers in the medium to the fact that advertising agencies were successful in developing the type of copy which obtains maximum advantage from every sales and merchandising possibility offered by the medium to the advertiser.

Field-testing Transformer

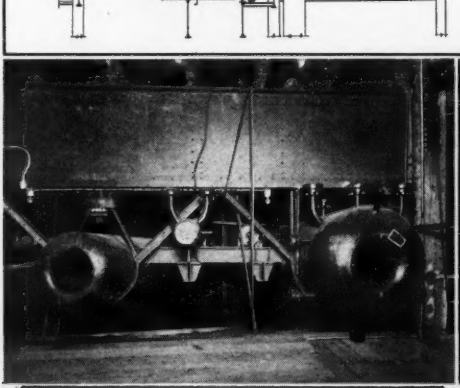
A NEW portable current transformer, the JP-1, is announced by the General Electric Company. Designed especially for field testing, the transformer is a lightweight, multi-range device with an accuracy suitable for use with portable instruments. A combination of wound-primary and through-primary construction, and a tap in the secondary, is used to obtain additional ratios.

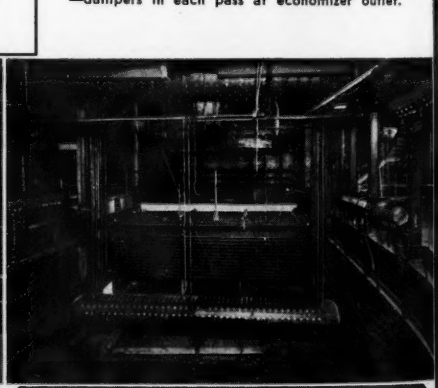




3 new

Sectional side elevation of new Stirling Boilers, under-feed-stoker fired. Boilers and water-cooled furnace walls completely top supported. Superheat control by damper regulation of gas flow through three parallel gas passes extending through superheater and economizer, no superheater tubes in center pass —dampers in each pass at economizer outlet.





① Welded top drums, 36 in. and 54 in. diameter, 35 ft. 4 in. shell length. Drums and boiler tube banks are suspended from girders 5 ft. deep by hanger rods 4½ in. diameter.

② Looking rearward between the upper and lower boiler drums toward upper section of economizer before placement of boiler tubes—arrangement of tube holes in drums visible. Upper headers of water-cooled sidewalls are in place.

THE BABCOCK &

BOILERS AT DELRAY No. 3

DETROIT EDISON COMPANY

rovide Necessary Additional Capacity, ncrease Station Economy Through igher Pressure and Temperature

uipment:
Stirling Boilers with Bailey Water-Cooled Furnaces, and B&W Superheaters, Economizers, and Air Heaters.

sign Data:

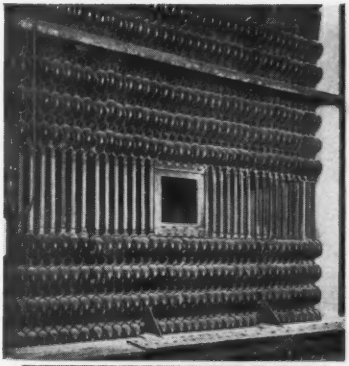
Capacity Each, lb. steam per hr.	344,000
Pressure, lb. per sq. in.	950
Total Steam Temperature, F.	910

Superheat control by regulation of gas flow over superheater surface.

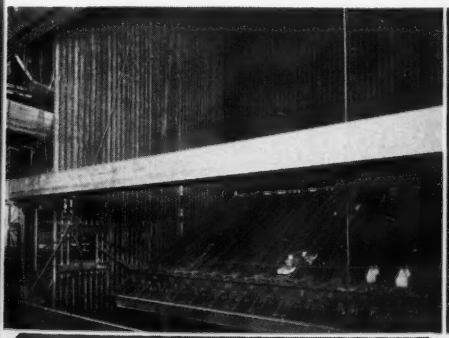
otographs taken during erection. Two boilers are now in rvice.

THE BABCOCK & WILCOX COMPANY
Liberty Street New York, N. Y.

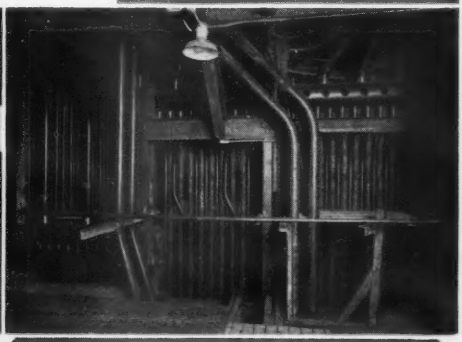
G-154-T



(5) End view of return-bend economizer—in two readily cleanable sections—tubes 2½ inches O.D., 26 ft. exposed length, 18,300 sq. ft. of surface.



(3) View of furnace showing the stoker, arrangement of tubes in the uptake wall and one of the sidewalls. (Downtake wall tubes not yet in place.) Suitably disposed areas of bare-iron blocks, partially-studded and bare tubes will provide: protection of tubes along the stoker against erosion, a high-temperature combustion zone, and a zone for cooling the furnace gases and entrained particles of ash.



(4) Discharge from sidewall tubes passes into upper headers shown at lower left and upper right thence into boiler drums through the large tubes rising from the top of the headers. Openings in wall permit inspection of upper section of boiler tubes.

WILCOX COMPANY

Take it from this old timer . . . when he says that

J&L SEAMLESS STEEL BOILER TUBES

are, *"The best tubes we have handled in 40 years"*

Mr. H. Wolford of H. Wolford & Company, Philadelphia, has been repairing boilers for over forty years. Read what he says about J & L Boiler Tubes —

"For many years, we have used one make of Boiler Tube and thought they were best, but just a few weeks ago, we placed through a Philadelphia jobber an order for 192 of your 3" x 18' Seamless Steel Tubes and want to say that these tubes are the best for staying put and turning over that we have handled in forty years. From now on we will handle nothing but J & L Tubes."

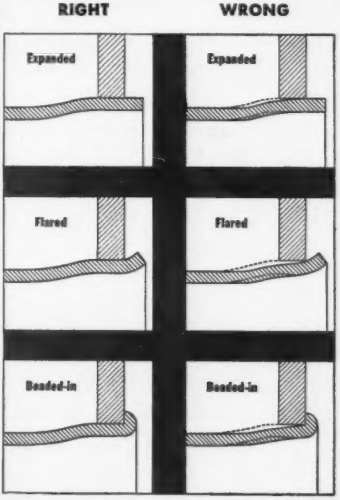
You, too, will find that J & L Seamless Steel Boiler Tubes roll in faster and stay put . . . that J & L Boiler Tubes save you money on installation costs . . . and that their longer life and increased efficiency keep boilers at work earning profits instead of losing them.

There can be no failure at or near a weld with J & L Seamless Steel Boiler Tubes . . . because there are no welds. They are rolled from solid billets of selected steel. When you need boiler tubes in a hurry, these easy working J & L Tubes are no farther away than your telephone. Call your J & L distributor. He has a complete stock of sizes 1" O.D. to 6" O.D. inclusive, which comply with all recognized boiler specifications.

Why High Ductility is Vitally Important

(a) Jones & Laughlin Seamless Tubes with their high ductility form a smooth, tight joint and "stay put" permanently... when they are expanded, flared and beaded in. See diagrams below.

(b) Tubes not sufficiently ductile resist forming and tend to pull away from the boiler plate. Such tubes require longer time for working and leaveimperfect joints. See diagrams below.



J & L manufactures a complete line of seamless and welded steel tubular products. This includes seamless pressure tubes, condenser and heat exchanger tubes.

• • •

Flange steel plates and firebox steel.

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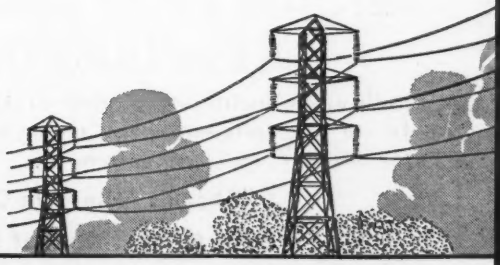
Transmission line construction costs can be materially reduced and completion expedited by using Hoosier Crews



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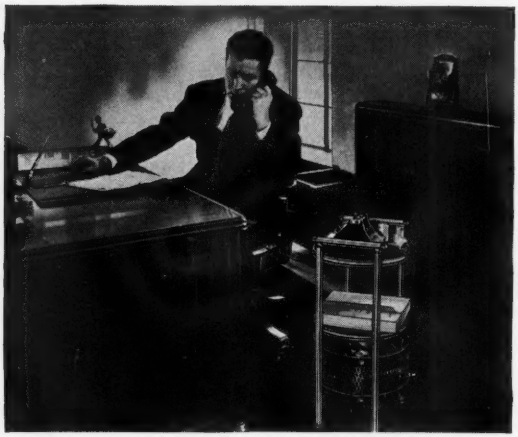

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At last . . . Draftless ventilation and complete air recirculation with this newest, scientifically designed unit. Use it in any room in the house. Place it by your bed for ALL NIGHT operation, without danger of "catching cold". Utility table model in gleaming-chrome-plate and black enamel.

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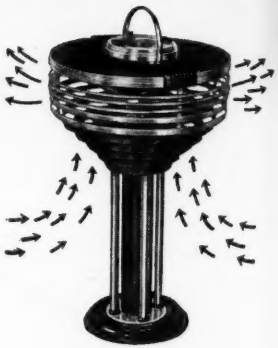
Built into a Handsome Smoker Stand

From all outward appearances you would never suspect that this beautiful smoker contained a powerful electric air recirculator. Fitted with alcohol-proof bakelite-surfaced tray with disappearing ash receiver. Chrome and black finish.



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Built up to quality—to be sold on Air Deliveries instead of inches. Sizes, 16″ to 42″, including direct motor and belt driven Exhausters. Designed for effective, quiet air movement.

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CABLE TESTING

Many power companies are now contemplating purchases of new material for necessary expansion. Some of these purchases will include high voltage cable.

Checks of cable quality by E. T. L. *at the factory* are inexpensive and good insurance against trouble in the future.

ELECTRICAL TESTING LABORATORIES
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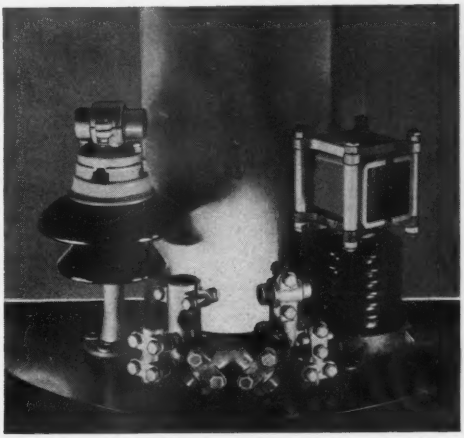

R&IE *conductor* SUPPORTS *and* FITTINGS

Sometimes erroneously thought of as merely an incidental part of a substation network, conductor supports and fittings actually form an extremely important part of a system. A failure at any one support or joint is sometimes as costly to the system as the breakdown of a machine. R&IE carefully designed and properly made conductor equipment is the choice of many Utilities where continuity of service is paramount. Tested designs, excellent quality materials, and care in manufacture, form the foundation for the production of R&IE conductor supports and fittings.

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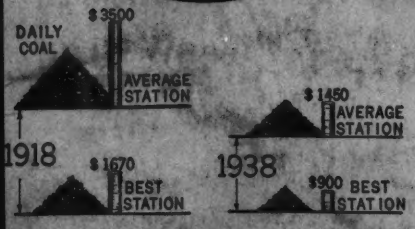
Hour of Stars—the Cities Service Concert—with Lucille Manners, Ross Graham and Frank Black's Orchestra and Singers—broadcast every Friday evening over the N.B.C. Red Network.

MODERN generating equipment is achieving new records in efficiency — continues to make one pound of coal do more work



Remarkable as these economies in coal consumption seem, they become even more significant when we relate them to the total daily fixed charges on the turbine-generator set. The difference in daily coal consumption between today's average station and 1918's best station, of the same size, almost exactly equals the daily investment charges (at 13 per cent per annum)!

IT'S a fact that electrical rates have seldom gone up that taxes have seldom gone down. Faced by ma costs and decreasing income, the electrical industry long ago, to cost reductions in generation, transmissi distribution.

HOW THE SAVINGS WERE MADE

So the work of research engineers in learning how to special alloys which can withstand high temperatures a pressures, and of designing engineers in learning how these new metals in the design and production of more e turbine-generators, has been a contribution of vital impo to the welfare of the electrical industry.

The illustrations at the left show one of the practical re that work—tremendous savings for every operating co This story of savings is a story of continually higher effici —efficiencies that back in 1905 listed 500 F as the max steam temperature compared with 950 F today, and 180 p as the maximum steam pressure contrasted with today pounds. And still the limit has not been reached.

THE BENEFITS OF HYDROGEN-COOLING

Other kinds of developments, too, have aided in making e generation less expensive. The latest of these, of course, sealing of the high-speed rotor in a light-weight hyd atmosphere, which eliminates 90 per cent of the windag Since the first hydrogen-cooled machine was install October of 1937), these machines have been going into s at a rate of 30,000 kilowatts a month.

Cost reductions, many of them of major proportions, a one result of General Electric's extensive research. But in ever way the benefits of this research come to you, whet lower costs, a wider market for your services, or a new to provide better service for your customers—these b are yours as added returns from your purchases of G Electric products.

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